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CARRIERS' LAW,

RELATING TO

GOODS AND PASSENGER TRAFFIC

ON

RAILWAYS, CANALS, AND STEAM SHIPS,

WITH CASES.

BY

E. B. IVATTS,

GOODS MANAGER, MIDLAND GREAT WESTERN RAILWAY.

(Late of Great Indian Peninsular—L. & N. W.—West Mid.—Buffalo & L. H., and L. & Y. Railways.)

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TO

SIR RALPH S. CUSACK, D.L.,

THE RESPECTED

CHAIRMAN

OF THE

MIDLAND GREAT WESTERN RAILWAY

OF IRELAND.

PREFACE.

FIVE years since I took upon myself the task of compiling a work on legal decisions in the higher Courts of Justice in respect to Railway Traffic, and the following pages are the result. The spare time of a railway official available for literary pursuits is very limited, and this, together with the difficulty in getting access to the records of the trials, explains the length of time occupied in this work.

I am led to consider such a book as this necessary from the difficulty I have always experienced in obtaining information on Carriers' Law from ordinary law books written by barristers, and other railway officials will probably have experienced a similar difficulty. In such text-books one can seldom find the required information on the particular point that may be at issue. This may arise from barristers writing books technically obscure to the possible litigant who may be able to pay for an opinion, or it may arise from the technicalities of a carrier's business being too obscure for barristers to eliminate from the trials the essential points upon which a carrier requires information. It is likely that both these causes may have contributed to render barristers' books unsuited as legal guides to common carriers. Furthermore, barristers' books are commentaries on legal decisions, whereas a carrier wants the actual case as unfolded at the trial; that is to say, the facts stripped of legal technicalities, with the material part of the Judge's decision added thereto. This is exactly what has been attempted in the following pages. In fact, I have taken the law, as unfolded by the Judges, and classified and fitted it into the railway frame ready for easy reference. In the main I have abstained from being a commentator, preferring rather to collate the words of the Judges and apply them directly to the sections of the business to which they relate.

The annoyance the reader is subjected to when consulting an ordinary book on Carriers' Law consists in having to read the notes on each page referring him to other parallel cases, but which other

cases are seldom to be found in the book. I determined, therefore, to dispense with all this, and to get rid of side-notes and foot-notes altogether. The question, however, arose—How was this to be done? I could find no law book without notes, and the ancient books seem to be even worse in this respect than the modern ones. However, the classifying power of a railway education came to my aid, and I devised an arrangement likely to be found convenient, and which it is hoped will meet with the approval of my readers.

The cases are arranged in numbered order as nearly as possible as they relate to each particular section of the business. There are many instances, however, where a Judge's decision has not only settled the one point at issue, but has also elicited the Judge's opinion (*dicta*) in respect to different other points relating to other sections of the business. Thus it has often been found necessary to "cut up" a Judgment into several "Digests," and marshal these several "Digests" under the particular section of the business to which they have special reference, while at the same time giving the Judgment at some length in the report. This has led to some repetition of "Digests," but such was unavoidable, seeing the object to be attained was to make each section as complete as possible in itself.

It is hoped this book will be found of service to the majority of railway officials. There are many experienced officials familiar with most of the leading points of Carriers' Law, but very few able to quote the cases or refer to the legal authorities where the cases can be turned up. Many barristers and solicitors, with business chiefly in other legal channels, are lamentably deficient in their knowledge of Carriers' Law, and their misdirected persistency when in the wrong cannot be overcome unless they are referred to the authority of their own law reports. An official, by the aid of this book, will now be enabled to take a different stand with his legal adviser than he could heretofore, when occasionally he may have been forced to hold his peace and submit to contradiction.

Officials dealing with compensation cases may, from a study of the following pages, greatly extend their knowledge as to the limit of a carrier's liability in respect to goods and passenger claims. The successful resistance of a claim depends greatly upon the elimination of the real facts of the case. The judgment to determine

the kind of facts necessary to be worked up in any case rests upon an extensive knowledge of the particular facts that have controlled the legal decisions of the past. It is useless to employ clerks' time, at great expense, in working up a mass of information utterly useless as a legal defence. It is, however, requisite, as a matter of discipline, to collect such facts as will fix the blame of the loss or damage upon the person in fault.

The frequent haphazard decisions in County Courts all over the kingdom in small cases against carriers is a great grievance, as these decisions are so frequently inconsistent one with another. County Court decisions usually appear to be decided by the Judge's view of the equity of the case, and not upon the legal merits. Thus the principles decided in the higher Courts are too often laid aside, and claimants encouraged to believe they can recover under almost every conceivable circumstance. This emboldens litigants, increases litigation, and disseminates false opinions among traders as to the extent of the liability of carriers. It is hoped that this book will diffuse among railway officials more positive knowledge of the limit of a carrier's liability, and that in time to come it will lead to more uniform decisions by County Court Judges. With some companies the station-masters and claims clerks attend County Courts to defend small cases. I venture to believe that if this book is handed up by a station-master to any County Court Judge as a text-book, and the case quoted proves to be in point, the Judge will deem it necessary to adjourn the case to afford himself the opportunity of referring to the law report which has been quoted, so as to keep himself right in case of an appeal. If in the future a little spirit is shown in taking a few appeals into the higher Courts, and these appeal cases are wisely selected, so as to prove successful, the practice of the County Courts may be greatly improved.

The money paid yearly in compensation is, in the gross, a very large sum, although, when the thousands of passengers and thousands of tons of goods carried are considered, and an average taken, the loss is not more than may fairly be expected. At the same time, anything that can be done to reduce the item of compensation is so much more money into the pockets of the shareholders. The following statement of money paid as compensation by

the railway companies of the United Kingdom is taken from the Parliamentary Returns for the several years quoted:—

	1881.	1880.	1879.	1878.	1877.	1876.
England and Wales.	£	£	£	£	£	£
Personal Injury	185,949	185,396	172,986	222,290	255,760	287,201
Damage and Loss of Goods	167,975	156,667	169,038	208,637	262,202	289,017
Legal and Parliamentary	228,545	217,516	186,261	195,753	220,820	299,194
Scotland.						
Personal Injury	63,242	44,731	13,166	15,883	12,008	25,330
Damage and Loss of Goods	12,783	14,460	14,580	17,272	25,044	24,036
Legal and Parliamentary	46,419	42,995	18,730	33,043	22,839	25,472
Ireland.						
Personal Injury	4,977	3,973	23,904	16,300	17,201	7,335
Damage and Loss of Goods	5,520	4,782	6,340	8,238	13,120	10,896
Legal and Parliamentary	15,518	16,621	14,854	9,487	12,543	13,158

I am of opinion the investigation and settlement of goods claims by railway companies might be greatly improved. The routine in commencing to investigate a claim is to collect together all the facts, and for this purpose the case is, as it were, put into a mill, and a considerable amount of information is ground up, collected, and tabulated. A great portion of this information often does not really bear upon the case, and is quite superfluous. The inquiry having been completed, some person in authority then expresses an opinion upon the collected facts, and action is taken accordingly. I consider the investigation of claims by correspondence is uncertain, dilatory, and imperfect. Officials through whose hands the goods have passed, or who are concerned in the case, while desiring to protect and save the company, often exhibit a greater interest in trying to save themselves from blame and discredit; hence reports are too often personal defences rather than undiluted statements of fact. On a large railway I would have one, or perhaps two, central claims offices. To these I would attach a special class of men, trained to be claim inspectors, and they should be as good in quality as travelling auditors. They should have districts, and should travel and person-

ally investigate and report upon every claim worth investigation. They should catechise every man through whose hands the goods may have passed, take down men's statements in writing, which should be signed by the men, and, in fact, *carry each case through from beginning to end.* These claim inspectors should be thoroughly versed in railway business and Carriers' Law, and be paid about £150 a year. This would reduce the claims correspondence to almost *nil*, and greatly expedite the inquiry into and settlement of claims. It should put the collection of the facts into quite independent hands. It should also put the elimination of the facts into the hands of thinking men, supersede the routine correspondent clerks, and limit the inquiry to the essential facts only. The expense would be no greater, and probably less, because many of the present chief claims clerks might become inspectors, and the juniors could be transferred to other departments. The number of clerks would be less, but the rate of pay to the fewer men would be advanced, and the quality and judgment of the men would be of a higher standard. The claim inspectors might attend their own cases that drifted into the County Court, and thus often save legal expenses.

The following cases number nearly eight hundred. I could have collected probably a couple of hundred more, but I found that I had taken a sufficient number of leading cases to illustrate the law on all important points connected with the business of a carrier. Furthermore, I feared to make the book too bulky and too costly in production. If my efforts prove acceptable, and there should be a demand hereafter for the then recent cases up to date, I may perhaps venture to compile an "Appendix" volume, classified in like manner, and containing such additional cases, both new and old, as would be likely to prove serviceable.

E. B. IVATTS.

February, 1883.

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Kent's Commentaries (Vol. 2, p. 791).	
Story on Bailments, section 549.	
Equality Clause, 17 *and* 18 *Vic., cap.* 31, *sec.* 2.	

DIGEST.

In *Southcote's Case* (1601) it was decided that if goods were delivered to be kept *safely* though the Defendant (as a carrier) had been robbed of them, "detinue" would lie against him, for he must take his remedy against the thief or the hundred (district) as he can. But if the goods were delivered to the Defendant (as a warehouseman) to take care of them as his own goods, &c., if he be robbed of them that is a good plea. This defines the difference between a carrier for hire and a bailee or warehouseman.

In *Morse* v. *Slue* (1670) a package containing a great sum of money was delivered to a carrier and contents declared as "Silk." The carrier was robbed, but was still held responsible for the loss.

In *Jackson* v. *Rogers* (1683) Chief Justice Jefferies held the carrier was bound to carry, on it being proved that he had the convenience.

In *Dale* v. *Hall* (1750) Chief Justice Lee held that the carrier was a common carrier and not a special carrier, and consequently was bound to deliver safely.

In *Golden* v. *Manning* (1773) Justice Gould said—"There is no occasion to enter, as has been done at the bar, into the general question of the duty of common carriers, though it is held in *Owen*, 57, that all carriers are bound to deliver as well as to *carry* the goods."

In *Forward* v. *Pittard* (1785) twelve pockets of hops had been accepted at Weyhill, where an annual fair is held, to carry to Shaftsbury by road. The hops were stored by carrier in a booth, the booth took fire from a neighbouring booth, and the hops were burnt. Lord Mansfield held that the contract of carriage had commenced, that the carrier was an insurer, that the fire was not by lightning or the act of God, and that the carrier was responsible.

In *Nicholson* v. *Willan* (1804) it was a case where goods valued at £58 were lost, and the value was undeclared, while the carrier's notice as to goods over £5 was proved. Lord Ellenborough laid down the law very clearly as to special acceptances (see Report).

In *Buckman* v. *Levi* (1813) Lord Ellenborough said—"But no receipt was taken for the chairs, they were not booked, and no person belonging to the wharf is fixed with a privity of their being left there. The Plaintiff was bound to procure them to be booked, or to deliver them to the wharfinger himself, or person who can be proved to be his agent for the purpose of receiving them."

In *Butler* v. *Basing* (1827) a box instead of being delivered at the Coach Office was delivered to the carrier's waggoner and was lost. Baron Garron told the Jury that delivery of a parcel to any of the meanest of the carrier's servants is quite sufficient, provided that servant in receiving parcels, &c., be acting by the authority or with the assent of his master. But it is equally clear that if persons be foolish enough to send parcels by the waggoner for hire paid to him, which is never to find its way into the pocket of the owner of the waggon, then the owner is not liable in case the parcel is lost. Verdict for carrier.

In *Riley* v. *Horne* (1828) it was laid down by Chief Justice Best in a very elaborate Judgment—(1) that the senders are liable to declare contents and value of goods in packages, (2) that a carrier is an insurer and may charge for such insurance over and above his labour and expense, (3) that a carrier can refuse goods if he has not room, (4) that a carrier can refuse a package of goods if the sender refuses to tell him its contents.

In *Palmer* v. *Grand Junction* (1839) Baron Parke held that "If the Company choose to carry and do not take care to accept the goods with a limited responsibility (of which we are to assume there is no evidence in the present case), then the question is whether the common law liability is not cast upon them, and I am of opinion that it is."

In *Robins* v. *London and Birmingham* (1839) Plaintiff applied to the Company to have their goods carried in the Company's carriages. The Company refused, although the Company had entered into arrangements with another firm of carriers to convey their goods only. Messrs. Robins applied for a mandamus.

Justice Patteson said—"A mandamus, if granted at all, must be to do something which the Company are required to do by the Act of Parliament, not something which they are required to do by the general law of the land. Now it is admitted that there is no clause in the Act requiring the Company to take the goods of all

persons who present them for conveyance in the carriages of the Company, and indeed the Act seems rather to negative such an obligation. The 171 Section authorises all persons to use the railway with carriages properly constructed on payment of certain rates, and it seems therefore that the present applicants may make carriages of their own, and may require the Company to allow them to be conveyed along the railroad. By 174 Section the Company are *empowered*, not *required*, to provide locomotive engines, or other power for drawing things along the railway, and may recover such sums of money for the use of them as they think proper, *in addition to the other rates authorised to be taken.* It seems, therefore, that it was not intended by the Act to compel the Company to take all goods of all persons which might be offered to be conveyed. The argument next is that the Company have held themselves out to the world as common carriers, and that therefore they are within the general law, and are obliged in consequence to carry all goods if they have room and means, and that therefore they have no right to do so great an injury to one set of carriers as to refuse their goods, and to take the goods of others. It is agreed that that cannot be done by the general law of the land, but a breach of the general law is the subject of an action. The Court will never grant a mandamus to enforce the general law of the land, which may be enforced by an action."

In *Walker* v. *Jackson* (1842) Baron Parke said—"I take it now to be perfectly well understood according to the majority of opinions on the subject, that if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary. If he ask no questions and there be no fraud to give the case a bad complexion on the delivery of the parcel, he is bound to carry the parcel as it is."

In *Machin* v. *London and South Western* (1848) the Company's carting agent's carter stole a bale of silk

value £150. Chief Baron Pollock said—"Chaplin & Horne must be considered as the servants of the Company, and anybody whom Chaplin & Horne employed for the purpose of delivering these goods were also the servants of the Company, and it makes no difference that by reason of some contract between the Company and Chaplin & Horne the Company have not the power of dismissing such servant." This decides the question that a carting agent's carter going round with a collecting cart binds the Company by his acceptance of the goods.

In *Richards* v. *London Brighton and South Coast* (1849) Chief Justice Wilde said—"The duty of common carriers in the common course is perfectly well understood, they give a warranty 'safely and securely' to convey and deliver. It is immaterial whether there be negligence or not, the warranty is broken by non-delivery."

In *Crouch* v. *Great Northern* (1854), and other packed parcel cases, it was held that railway companies are bound to receive "packed parcels" from intercepting carriers and charge them at the same rate as they do packages containing "enclosures" from the large London city houses.

In *Crouch* v. *London and North Western* (1854) Chief Justice Jervis said—"No authority has been cited to show that a carrier is entitled in every case to know the nature and quality of the goods tendered to him to be carried; and on looking at the other provisions of the Act of Parliament there seems to be no reason why the Company should make the inquiry. With reference to dangerous articles, they are entitled by the Act to know the nature and quality, and such must be discovered to them at the time of the delivery; and if the Company *suspect* articles to be of a dangerous nature they may open the packages."

In *Coleman* v. *Riches* (1855) a carrier's clerk issued a receipt for fifty-eight sacks of wheat he never received, with intent to defraud. On the faith of the receipt

Coleman paid to a third person the value of the wheat. Chief Justice Jervis held the clerk had authority on the evidence, only to give receipts for goods which were in fact delivered. Here the servant was not acting in the due course of his business or professing so to do. He did not act for his master but in contravention of his duty to him and against his interest. Judgment for carrier.

In *Savage* v. *Newry and Warrenpoint Railway* (1866), which was a Quarter Sessions case, the Company owing to a press of traffic could not supply waggons for conveyance of coal. The Court held—(1) There being no contract with Plaintiff the Company had a right to make the choice in giving the preference. (2) If there had been no other coal to be carried then the Company would have been liable. (3) There was no general refusal on Company's part, but a refusal under special circumstances.

In *Page* v. *Great Northern* (1868) cattle were delayed. It was the usage of the Company to register cattle at the time taken into their yard in Dublin, and the cattle were shipped in turn as registered. Between 3 and 4 a.m. on a Sunday morning cattle were brought to the yard, and the Company's night porter, who was ill, told Plaintiff's man through the bedroom window he could not then let the cattle in, but said they had better be taken to grass and they should be registered at that time (3 a.m.) to take turn for shipment. They were not shipped in this turn. It was held the man was acting within the scope of his authority, and that what had occurred was equivalent to acceptance of the cattle at the particular time tendered. Verdict, £50 against Company.

In *M'Court* v. *London and North Western* (1869) two bullocks out of 31 bullocks died on the voyage, Dublin to Liverpool, en route to Leicester. It appeared the bullocks were shipped in a hurry at Dublin by the City of Dublin Company's Steamships and were not booked. At Liverpool the London and North Western

Company booked *twenty-nine bullocks, Dublin to Leicester*, and took the carriage. The Court held the London and North Western Company were rightly sued for the two dead bullocks, and gave a Judgment against that Company for their value.

In *Heugh* v. *London and North Western* (1869) Baron Martin said—"If a person undertakes the duty of a carrier there is a most onerous duty imposed upon him. He becomes in point of fact an insurer, and when he has done all he has contracted to do *as carrier* that condition ceases, and he may be in condition of a man with goods forced upon him, and that imposes upon him the duty of acting as a reasonable and prudent man would do."

In *Baxendale* (*Pickford & Co.*) v. *London Chatham & Dover* (1874) a man named Hardy delivered to Pickford and Co., in London, a case of pictures of the declared value of £1,000, for conveyance to Paris. Pickford and Co. sent the case by London Chatham and Dover Railway consigned to their own agent at Calais. At Dover the case was allowed to drop into the salt water, and the pictures were ruined. Hardy sued Pickford and Co., and the latter contended they did not undertake a through contract and only received the case as forwarding agents, and their responsibility had ceased when the damage arose, and that they were protected by the Carriers' Act. The verdict went against Pickford and Co. for £650.

In the *Southsea and Isle of Wight Steam Ferry Co.* v. *London and South Western* (1876) the Plaintiffs ran vessels from Southsea to Ryde. The railway company booked passengers through from London to Ryde, which passengers were carried from Southsea to Ryde by a rival Steamship Company. The Plaintiffs complained of undue preference in respect to the rates, the added locals compared with the through rate. It would appear the Plaintiffs could not compel the Company to make through booking arrangements by *their* line and route.

In *Evershed* v. *London and North Western* (1877) Lord Justice Brett said—"The Company may receive the goods at the edge of the railway, or they may receive elsewhere, but still they have to receive the goods in all cases in which they carry. Sometimes they do not receive the goods at the edge of the railway, but they receive them at receiving houses or, as in the case here, at the different places of business of their customers."

In *The Aberdeen Commercial Company* v. *Great North of Scotland* (1878) the Court of Railway Commission, upon the complaint that the railway company refused to carry dung, compost, phosphates, guano, &c., at rates within their Parliamentary Tolls, held that an intimation to senders that they (the railway company) do not profess to carry such traffic, or that they are not common carriers of it, is of no avail to entitle them to *impose their own rates* of charges regardless of limiting clauses.

In *Kuverji Tulsidass* v. *Great Indian Peninsula* (1878), a case tried in Bombay, it appeared the goods had been taken from the Company by robbers, and according to the Indian Contract Act, 1872, the Company were held not liable as insurers. By this decision the common law of England has been superseded in India in respect to goods taken by robbers who are not the Company's own servants."

In *Waller* v. *Midland Great Western* (1879) Plaintiff ordered horse boxes for a particular day to convey horses, Athboy to Dublin. The horse boxes not being ready, Plaintiff walked his horses twenty-four miles to Dublin. It appeared the horses had not been "hard fed" and were unfit to do the journey, hence their condition was injured and they sold for less money. On appeal, the Court held "the true measure of damages was the deterioration which the horses if in ordinary condition, fed to make the journey, would have suffered thereby, and the time and labour expended on the road." It was held from what had taken place

the Company had contracted to supply the horse boxes and failed to do so.

Equality Clause.—The 17 & 18 *Vic., c.* 31, *Section* 2.—Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivery of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and every railway company and canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways and canals by the other without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals, or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public on that behalf.

Story on Bailments. Section 549.—We come next to consider the effect of special contracts and notices of carriers. It was formerly a question of much doubt how far common carriers on land could by contract limit their responsibility upon the ground that, exercising a public employment, they are bound to carry for a reasonable compensation, and had no right to change their common law rights and duties. And it was said that, like innkeepers, they were bound to receive and accommodate all persons, as far as they may, and could not insist upon special and qualified terms. The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note to *Southcote's* case (4 Rep. 84), and it was admitted in *Morse v. Slue* (1 Vent, 238). It is now fully recognised and settled beyond any reasonable doubt. Still, however, it is to be understood that common carriers cannot, by any special agreement, exempt themselves from all responsibility so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice exempt themselves from all responsibility in cases of gross negligence and fraud, or by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive limitations of his rights. And the carrier will be equally liable in the case of the fraud or misconduct of his servants as he would be in case of his own personal fraud or misconduct.

Extract from Kent's Commentaries on American Law, volume 2, page 791.—The *Locatis operis mercium vehendarum* is a contract relating to the carriage of goods for hire, and this is by far the most important, extensive and useful of all the various contracts that belong to the head of bailment. The carrier for hire in a particular case, and not exercising the business of a common carrier, is only answerable for ordinary neglect unless he, by express contract, assumes the risk of a common carrier. But if he be a common carrier he is in the nature of an insurer, and is answerable for accidents and thefts, and even for a loss by robbery. He is answerable for all losses which do not fall within the excepted cases of the act of God (meaning inevitable accident without the intervention of man) and public enemies. This has been the settled law of England for ages, and the rule is intended as a guard against fraud and collusion, and it is founded on the same particular principles of public policy and convenience which governs the case of Innkeepers. This principle of extraordinary responsibility was taken from the edict of the *prætor* in the Roman Law, and it has insinuated itself into the jurisprudence of the civilised nations of Europe. But the rule in the civil law was not carried to the severe extent of the English common law. So in France, common carriers are not liable for losses resulting from superior forces, as robbery, for that comes within the *damnum fatale* of the civil law which exempted the carrier, and the same rule has been adopted in the civil code of Louisiana. In Scotland, loss by fire is also considered as one happening by inevitable accident, and for which the carrier is not responsible; but Mr. Bell insists that loss by robbery ought not to be deemed an exception to the responsibility of the carrier, and that the many practical illustrations in the usual law ought to be received "as of more authority than hundreds of dicta rescued from the cobweb of the civilians." Any carriers undertaking generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire as a business, and with or without a special agreement as to price. They consist of two distinct classes of men, namely, inland carriers by land or water, and carriers by sea, and in the aggregate body are the owners of stage waggons, and coaches, and railroad cars who carry goods as well as passengers for hire, waggoners, teamsters, cart men, porters, the masters and owners of ships, vessels, and all water craft, including steam vessels and steam tow-boats belonging to internal as well as coasting and foreign navigation, lightermen, barge-owners, canal boatmen, and ferrymen. As they held themselves to the world as common carriers for a reasonable compensation, they assume to do and are bound to do what is required, in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price, and if they refuse without some just ground, they are liable to an action.

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1. *Dale* v. *Hall.*—Action for £24 for knives and hardware damaged in a barge, owing to rats having made a hole in the barge through which the water came, and although every endeavour by pumping was made the goods got damaged. Chief Justice Lee would not admit the distinction between a common carrier and a special contract, and says—"This is a nice

distinction, indeed. The declaration is that the carrier undertook for *hire* to carry and deliver the goods safe, and the breach assigned is that they were damaged by negligence. This is no more than what the law says—Everything is negligence in a carrier or loryman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of God or the King's enemies, and a promise to carry safely is a promise to keep safely." Justices Dennison and Wright concurred.—*Tried in Court of King's Bench, Michaelmas Term*, 1750.—*From vol.* 1 *Wilson's Reports, page* 281.

2. *Buckman* v. *Levi.*—Action for the value of two dozen chairs sold by Plaintiff Buckman, London, to Defendant Levi of Wells, Norfolk. Plaintiff's servant delivered the chairs addressed at Harrison's Wharf for conveyance; he left them on the premises there, piled up among other goods, he got no receipt for them, nor was any entry made in the wharfinger's books.

Lord Ellenborough said—"A delivery of goods to a carrier or wharfinger with due care and diligence is sufficient to charge the purchaser, but he has a right to require that in making this delivery due care and diligence shall be exercised by the seller. Before the Defendant can be charged in the present instance he must be put into a position to resort to the wharfinger for his indemnity. But no receipt was taken for the chairs, they were not booked, and no person belonging to the wharf is fixed with a privity of their being left there. The Plaintiff was bound to procure them to be booked or to deliver them to the wharfinger himself, or some person who can be proved to be his agent for the purpose of receiving them. The person upon the wharf when the chairs were left might be a thief watching for an opportunity to purloin them. The Defendant therefore, is not furnished with a remedy over against the wharfinger, and is not himself liable as purchaser of the goods."—*Tried at Nisi Prius, June* 17, 1813.—*From Campbell's Reports, vol.* 3, *page* 414.

3. *Butler* v. *Basing.*—Action for the value of a box of clothes, lost in transit by the waggon, Reading to Colnbrook.

The box was not delivered at the Coach Office, Reading, in the regular way, but given by sender to the waggoner, and, as the carrier contended, was so given to the waggoner to carry for his own gain.

Baron Garrow, in summing up to the Jury, said—"It is not necessary you should call up Mr. Pickford or any of the other persons who are the owners of these vehicles and deliver your parcel to them, but a delivery of a parcel to any of the meanest of their servants is quite sufficient, provided that servant in receiving parcels be acting by the authority or with the assent of his master. But it is equally clear that if persons be foolish enough to send parcels by the waggoner for a hire paid to him which is never intended to find its way into the pocket of the owner of the waggon, then the owner is not liable in case the parcel is lost.

"With regard to the amount of the damages in case a verdict passes for the Plaintiff, it is right that I should tell you that there is no distinct evidence of the contents of the box; however, I should recommend you not to pare down the amount of damages because the articles contained in it cannot be distinctly proved. It very often happens that persons, more especially those in the station of life in which the Plaintiff is, pack their own clothes, and in such cases it must be always impossible to give evidence of the precise contents of their boxes or portmanteaux. I should recommend you, if you find for the Plaintiff, to give damages proportioned to the value of the articles which you in your judgment think the box might and did fairly contain. However, the great question is whether this contract to carry the box was made by the authorised agent of the carrier, or whether it was a private bargain made with the waggoner for his own gain and distinct from his master."—Verdict for carrier.—*Tried at the Berkshire Assizes, March* 2, 1827.—*From Carrington and Payne's Reports, vol.* 2, *page* 613.

4. *Coleman* v. *Riches.*—Action for £124 15s. 0d., value of 58 sacks wheat. The Plaintiff (Coleman) was in the habit of purchasing wheat which was delivered to Defendant's (Riches) wharf at Bristol, to be carried to Cardiff, as Plaintiff was a

miller at Llandaff. Coleman had a clerk named A. R. Board, and this man combined with a farmer named Lewis to commit a fraud upon Coleman. Coleman met Lewis and Board together, and Lewis stated in Board's presence that he had delivered the wheat at the wharf, at the same time producing and delivering to Coleman a receipt note written by Board as follows:—

"Received from Farmer Lewis, fifty-eight sacks wheat, containing five bnshels each and one sack containing four—for Geo. Coleman, Llandaff. For C. H. Riches, A. R. Board."

Upon receipt of this note Coleman paid Lewis £124 15s. 0d., the price agreed upon. It turned out afterwards this was a fraud, and Riches the carrier was sued. On the first trial plaintiff was nor-suited with leave to appeal.

Chief Justice Jervis, in the appeal case, said—"I confess that from the commencement of the argument I have entertained no doubt in this case. I am satisfied that our Judgment must be for the carrier. It was only the case of a wharfinger whose duty it is on delivery of goods to give a receipt note. That consideration really disposes of the case, because Board had authority on the evidence only to give receipts for goods which were in fact delivered. Here the servant was not acting in the due course of his business or professing so to do. He did not act for his master but in contravention of his duty to him and against his interest. If this Court was right in the case of *Grant* v. *Norway* in holding that the master of a ship cannot bind his owners by professing to have authority to give bills of lading for goods which have not been shipped, when he has only authority to give such bills for goods actually shipped. The Plaintiff in this case cannot recover against the carrier. *Grant* v. *Norway* must be taken to be a proper decision. It has been acted upon in a case in the Exchequer (*Hubberstey* v. *Ward*) and it is only an illustration of a well-known rule." Judgment for carrier.—*Tried in Court of Common Pleas, May* 2, 1855.—*From Law Journal Reports, vol.* 24, *page* 125.

ACCEPTANCE OF GOODS WITHOUT LIMITING THE CONTRACT, MAKES A CARRIER RESPONSIBLE FOR A CONTRACT TO CARRY TO THE FINAL DESTINATION OF THE GOODS, AS ADDRESSED OR CONSIGNED.

	Case No.		Case No.
Hyde v. *Trent Nav. Co.* (1793)...	214	*Webber* v. *Great Western* (1866)	402
Muschamp v. *L. and P.* (1841)...	5	*Zunc* v. *South Eastern* (1869) ...	472
Watson v. *A. N. and B.* (1850)	6	*Meade* v. *S. E.* (1870)	403
Wilby v. *West Cornwall* (1858)...	7	*Teats* v. *D. and N. SP. Co.* (1872)	8
Malpas v. *L. and S. W.* (1866)	722		

DIGEST.

In *Hyde* v. *Trent N. Company* (1793) cotton, Gainsborough to Manchester, was accidentally burnt at Manchester. The Company had accepted the carriage at Gainsborough and also a separate sum of money for cartage in Manchester, which sum was to be handed over to a carting agent who carted goods from the Company's warehouse. Chief Justice Lord Kenyon held the Company liable for a through contract to consignee's warehouse, and held the Company liable because the loss had occurred during the transit, and not while the Company were holding the cotton as warehousemen.

In *Muschamp* v. *L. & P.* (1841) the Judge told the Jury that where a common carrier takes into his care a parcel directed to a port or place and does not by positive agreement limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although the place was beyond the limits within which he in general professed to carry, and Lord Abinger on appeal in the Exchequer Court confirmed this.

In *Watson* v. *A. N. & B.* (1850) a box for Cardiff was addressed "Paid to Bristol," but as the Station Master at Grantham could not accept carriage beyond Not-

tingham, a Company's servant altered the address to "Paid Nottingham," and the carriage was only paid to Nottingham, but Justices Patteson and Erle held the case to be ruled by that of *Muschamp* v. *L. & P.*, and the Company to be responsible for the through journey to Cardiff.

In *Wilby* v. *West Cornwall* (1858) the Company signed a note for two cases "for Mrs. Wilby, Wolverhampton, per first steamer from Hayle." No through rates existed; the Company did not hold themselves out to carry to Wolverhampton, and if they had controlled the route they would have sent the cases by Truro and Plymouth and so forward. Chief Baron Pollock held the Company had undertaken the through contract, and said—"I do not see that the question is affected by carrying partly by railway and partly by water, if the parcel were directed and accepted with the intention that it should go the whole way to its destination by one means or another."

In *Malpas* v. *London and South Western* (1866) a consignment of cattle was to be carried from Guildford to King's Cross, the London and South Western Company's London Station was Nine Elms. Sender signed a consignment note "To be sent to Nine Elms Station, &c." The carriage was charged forward. Sender swore the clerk told him the through carriage would be 14s., viz.: 8s. to Nine Elms, and 6s. Nine Elms to King's Cross. Sender, although he signed the note, did not read it or have it read to him. Chief Justice Erle held that taking the note and the conversation between sender and the clerk, the Company had undertaken *two contracts*, one Guildford to Nine Elms and the other Nine Elms to King's Cross. Judgment against Company.

In *Webber* v. *Great Western* (1866) Pickford and Co. were at Worcester agents for the London and North Western Company and also the Great Western Company. Pickford and Co. collected in Worcester a package for Chester, and delivered it to the Great

Western Company at Worcester Station on one of their (Pickford and Co.'s) own dockets, consigned *via* London and North Western Company, The clock was damaged. The Great Western Company contended the contract was with the London and North Western Company and not with them. The Court of Exchequer Chamber held that the contract was with the Great Western, and held them liable. It does not appear to have transpired at the trial that the Great Western Company could have carried the goods on their own line all the way from Worcester to Chester if the order on the docket had not been per London and North Western Company.

In *Teats* v. *D. and N. S. P. Company* (1872) a truss coming from Glasgow for Castleblaney was carried by Defendants, as intermediate carriers, from Ardrossan to Newry, and was delayed. Judge Whiteside, in the Queen's Bench, Ireland, held that the Company had kept up their character as carriers by sea only, on the evidence of their notice on sailing bill, and their advice to consignee of the arrival of the truss at Dundalk, and its despatch by railway forward.

In *Zunc* v. *South Eastern* (1869) a portmanteau was lost between Calais and Paris, the owner being a through passenger, London to Paris. Chief Justice Cockburn said—"Nothing can be plainer than that the Company have placed upon the contract a clear restriction that they will not be responsible except upon their own line or boat. There is nothing in law to prevent the Company putting such a limitation upon a contract. I am of opinion the Act of 1854 does not prohibit them from doing so. Section 2 enacts 'Every Railway Company shall, according to their respective powers, &c.' The general provisions are that 'whenever the Company is working its own line, or any line which it has obtained power to work, &c.' Duties are imposed upon railway companies by the Act, but those duties are limited to their own lines. *If they contract to carry beyond their own lines the whole matter is open and at large.*" Judgment for Company.

5. *Muschamp* v. *Lancaster and Preston Junction Railway Company.*—Railway officers are familiar with the law relating to through booking, where the receiving and contracting company undertakes to carry goods over their own railway and several other railways to the point of final destination, using each company as an agent in fulfilment of the contract. Few railway men, however, are acquainted with the details of the first legal decision establishing the law in relation to such contracts. There is a certain interest attached to this case of Muschamp's when we look back and contemplate a collection of insignificant facts instrumental in forming the groundwork of the law that controls half the railway traffic of Great Britain.

Action for the value of a box of stonemason's tools lost between Lancaster and Derby. Plaintiff had gone into Derbyshire in search of work, and his mother took his box of tools to the Lancaster Station, addressed to him at the "Wheatsheaf, Bartlow, near Bakewell, Derbyshire." The clerk at the station told her, in answer to her inquiries, that the box would go in two or three days; and on being asked if it would go sooner if the carriage were paid in advance, he inquired if any one was going with it, and on receiving an answer in the negative that the person for whom it was intended would be ready at the other end to receive it, said the box had better be paid for by that person on receipt of it. The Judge told the Jury that where a common carrier takes into his care a parcel directed to a port or place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, and that the same rule held although the place was beyond the limits within which he in general professed to carry on his trade of a carrier.—Verdict for the Plaintiff. A rule for a new trial was obtained on the ground of misdirection. On the new trial the Plaintiff contended there was evidence of the Company having undertaken to carry the box to the place of its destination, and that if the carriage had been paid at Lancaster the sum demanded would have been the carriage for the whole distance. The Company contended they held themselves out only as carriers between Lancaster and Preston, and they were not

liable for a loss beyond these limits. That they did not contract to carry the box further, since the mere receiving and booking of a box directed to Derby cannot amount to an agreement to convey to that place. If the rule were otherwise a carrier would be liable if a parcel were lost at any place between London and Land's End. In the case of *Upston* v. *Slack*, 2 *Car. and Pay.* 598, the name of the Defendant, who was the keeper of a large booking office, was over the door, near the words "conveyancers to all parts of the world," followed by a list of places amongst which was Windsor, and it was held that proof of the booking at that office of a box directed to Windsor, which did not reach its destination, was not sufficient to make the Defendant liable.

Lord Abinger did not think the question left to the Jury was misdirection. The Company admitted that they had something more to do than carry to Preston; they say they were to employ an agent, who was to be replaced by another, and so on until the end of the journey; that is certainly an extraordinary contract, involving a delegation of agency contrary to the principles of law. It is more likely that the understanding was, that, these companies are in the habit of making arrangements among themselves, for the conveyance of parcels along the whole line, agreeing to divide the profits. In my opinion the Jury have found the correct conclusion; what confirms that notion is, the whole of the carriage was to be paid at the end of the journey. In a case of loss the Company contend they break their contract when they refuse to furnish Plaintiff with the name of the carrier who lost the goods. The sum to be paid for the carriage of the parcel being an undivided sum seems to imply that the carriers subdivide their contracts, making as between themselves a sort of partnership in the carriage of the goods. In regard to the case of the booking office, parties taking charge of parcels at such offices are agents for the stage coaches, and those who book parcels there instead of going to the coach office make the book-keepers their agents. Now the book-keepers not being connected with the carriage of the goods, complies with his contract, when he takes to the coach office the parcel that has been intrusted to him. Baron Gurney concurred; Baron

Rolfe concurred, saying, that he had no doubt but that the construction put by the Court on this contract is in accordance with law, with common sense, and the convenience of mankind. —*Tried in Court of Exchequer, May* 28, 1841.—*From Law Journal Reports, vol.* 19, *page* 460.

6. *Watson* v. *Ambergate, Nottingham, and Boston Railway Company.*—Action for £50.—A prize of £100 had been offered by the Glamorganshire Canal Company for the best plan and model of a machine for loading colliers from barges, and plans and models intended for the competition were to be sent to Cardiff. The Plaintiff sent a plan and model from Grantham, but through negligence it did not arrive until the day after the award. When tendered the package was marked "Paid to Bristol," but the station-master said he could not accept the carriage beyond Nottingham, having no rates. A man named Cherins who had been employed by the station-master in delivering and collecting parcels, then altered the address to "Paid to Nottingham," but this was done without Plaintiff's knowledge. The case was first tried at the County Court (Grantham), when Plaintiff's brother, who had seen the models at Cardiff, swore he considered Plaintiff's plans better than any he saw there. A verdict was given for £20. An appeal was taken to the Queen's Bench, when Justices Patteson and Erle considered the case was ruled by *Muschamp* v. *Lancaster and Preston Junction Railway.* Their not having taken the amount of carriage is immaterial, and is explained by the fact of their not knowing what that amount would be. [The proper measure of damages in such case is the value of the labour and materials expended in making the plan and model, and not the chance of obtaining the prize, as the latter is too remote a ground for damages.] Justice Erle said we give no opinion as to the question of remoteness of the damages. Verdict confirmed.—*Tried in Court of Queen's Bench, May* 14, 1850.—*From Jurist, vol.* 15, 448.

7. *Wilby* v. *West Cornwall Railway Company.*—Action for £25 for damage to five cases of goods marked "Glass," with care—Penzance to Wolverhampton. On September 29, 1856, two cases were sent, and on October 24, three

cases. The Company's carter signed the following paper handed to him by sender:—"Penzance, September 29, 1856. Delivered to the West Cornwall Railway in good condition two cases for Mrs. Wilby, Stafford Place, Wolverhampton. Glass, with care, per first steamer from Hayle." The Company carried the cases to Hayle and there delivered them to the steamboat, by which they were conveyed to Bristol, and thence by railway to Wolverhampton. There were no through rates, and the West Cornwall Company, a local line of 25 miles only, did not hold themselves out to the public as carriers to Wolverhampton. It was not known at what point of the journey the goods were damaged, except that it was not until after the Company had delivered them into the steamboat. The Plaintiff contended that *Muschamp* v. *Lancaster and Preston Junction Railway* was a case in point, and quoted Baron Rolfe thereon (see case). The Company contended that in this case the Jury had been left to infer a contract for the whole distance. Furthermore, a particular route had been laid down *via* Hayle, and if the cases had not been so directed the Company would have sent them to Truro and thence to Plymouth and so forward. Chief Baron Pollock, said—"I should have been better satisfied if this question had been settled by a Jury whose province it is to determine questions of fact. There is, I think, evidence to go to a Jury that the Company undertook to carry the whole distance, and as we may draw such inferences as a Jury might have drawn, I think the Defendants did so undertake, I cannot appreciate the distinction sought to be made out in the argument between this and other cases of the same nature. I do not see that the question is affected by carrying partly by railway and partly by water if the parcel were directed and accepted with the intention that it should go the whole way to its destination by one means or another. Being of opinion, therefore, that there was evidence to go to the Jury who might find that the contract was to carry the whole way, I think the Judgment of the Court ought to be for the Plaintiff." Barons Watson and Channell concurred. Verdict against the Company.—*Tried in Court of Exchequer, January* 20, 1858.—*From Law Journal Reports, vol.* 27, *page* 181, *Exchequer.*

(The author has for years required senders to write on consignment notes the name of the Company's station when there have been no through rates to the point of destination. If in this case the wording had been "To Hayle by West Cornwall Railway, thence per steamer to Bristol," a through contract could hardly have been established.)

8. *Teats* v. *Dundalk and Newry Steam Packet Company.* —Action for delay to goods and refusal to accept them upon the ground of delay. The goods exceeded £10 in value, were verbally ordered of a Glasgow firm, who consigned them to Plaintiff, Mary A. Teats, Castleblaney, and delivered the goods for conveyance to a railway company, who transferred them to the Defendants, The Dundalk and Newry Steam Packet Company, plying between Glasgow and Newry as intermediate carriers, by whom they were landed at Newry, and there handed over to a railway company for transmission to Castleblaney, the Defendants giving notice by post to the Plaintiff that the goods were so forwarded. Plaintiff sued the Steam Packet Company for breach of contract to carry the goods to Castleblaney, and to deliver them there within a reasonable time.

On the first trial, before Lord Chief Justice Whiteside, the Jury found for the Plaintiff, Verdict, £20 damages.

On the appeal case Chief Justice Whiteside said—"The issues in this case are, first, did the Defendants make the contract, and consequently is the second defence true in substance and in fact.

"The goods were originally sent by the Scotch house in Glasgow to the Glasgow and South Western Railway Company, to be carried to Ireland ; but it is important to observe that no evidence whatever was given as to the terms upon which these goods were delivered and received by the Defendants.

"As to the question of damages there is in my opinion great force in the objection made to the conduct of this lady. It appears she refused to take or even to look at the goods which she claims to have been her goods. What she ought to have done was to have taken them, and to have endeavoured to have disposed of them, and if she had suffered any loss upon such sales as she might have effected, then she might have been entitled to sue the Company for the amount of that loss. We

are all therefore of opinion that the verdict must be entered for the Company."

Justice Fitzgerald said—"We were told that when a common carrier receives goods addressed to a certain place a contract is implied on his part to carry to that place. That is, however, only where the carrier is a general carrier: but here the Defendants are carriers by sea only, every document produced shows that they undertake to carry by sea only. There is not a word to induce any one to believe that they contracted in this case to carry to any place beyond Newry. Judgment for Company.—*Tried in the Court of Queen's Bench, 25th November*, 1872.—*From Irish Reports, Common Law, vol.* 6, *page* 536.

WHERE THE FIRST CARRIER BY A SPECIAL NOTICE LIMITS OR ATTEMPTS TO LIMIT THE CONTRACT OF CARRIAGE TO HIS OWN TERMINUS, ALTHOUGH ACCEPTING THE CARRIAGE FOR THE THROUGH JOURNEY.

	Case No.		Case No.
Fowles v. *Great Western* (1852)...	9	*Coxon* v. *Great Western* (1860)	13
Jonassohn v. *Great Northern* (1854)	10	*Aldridge* v. *Great Western* (1864)	14
Collins v. *Bristol & Exeter* (1859)	11	*Stevenson* v. *L. and N. W.* (1867)	448
Mytton v. *Midland* (1859)... ...	460	*Malton* v. *I. N. W.* (1870) ...	690
Hayes v. *South Western* (1859)	12		

DIGEST.

In *Fowles* v. *Great Western* (1852) a case of glass was broken when being unloaded at Brompton at consignee's door, carried by the Company, Bristol to Paddington. The Company included the cost of delivery in their rate, and appointed a carrier (Sherman) to deliver, Paddington to Brompton. On the receipt note, under the head of "To what Station," the word "Paddington" was written. The address, "Montpelier Row, Brompton," was in pencil. Baron Parke held that the Company's conditions of carriage limited their contract to Paddington Station only, and that the words in

pencil were a mere memorandum of the address of the person and not an alteration of the contract.

In *Jonassohn* v. *Great Northern* (1854) a written agreement had been made for transit of full trains of coal from Usworth to London, but there was a stipulation in the agreement that the Y. N. & B. Company *should haul the full and empty waggons from Usworth to York*. Baron Platt held that this stipulation limited the Great Northern Company's contract to between York and London.

In *Collins* v. *Bristol & Exeter* (1859) Lord Chelmsford in the House of Lords held against the Company, that the contract (as worded) did not exempt the Company from a through contract, Bath to Torquay; that the conditions the Company relied upon only related to the *delivery* of goods at the end of their line, in fact the local delivery, and did not exempt them from the through contract. Lord Wensleydale said it was an ill-penned contract, and it was not surprising that those whose duty it is to construe it should form different opinions upon its meaning. This Judgment does not go the length of deciding that a first carrier may not by some such notice limit his liability to his own terminus, although accepting the carriage for the through journey. In fact the Exchequer Chamber ruled in the Company's favour, but the House of Lords reversed that decision, thereby supporting the case of *Muschamp* v. *L. & P.*

In *Mytton* v. *Midland* (1859) an artist booked through by South Wales Railway Company from Newport to Birmingham. His portmanteau was lost after receipt at Gloucester by Midland Company. The Court held that the through contract was made with the South Wales Company. Baron Martin said—"Seeing that the South Wales Railway Company's Act had a proviso that a passenger takes his luggage at his own risk, an action would not have succeeded against that Company." Judgment for Midland Company.

In *Hayes* v. *South Wales* (1859) pigs were delayed, Cork to London, owing to hazy weather. A Mr. Redman owned the steamers running from Cork to Milford Haven, and over the door of his office was a sign-board, and "South Wales Railway Company's Office" painted on it. The Court held that the South Wales Company were liable for a through contract and were rightly sued.

In *Coxon* v. *Great Western* (1860) the decisions in *Muschamp* v. *L. and P., and Collins* v. *Great Western* were upheld. The contract was held to be a through contract made with the Shrewsbury and Hereford Company, at Craven Arms, for carriage of cattle to Birmingham. Although the cattle were injured in a defective waggon *belonging* to the *Great Western Company*, and although there was a condition by the Shrewsbury and Hereford Company disowning a through contract, Baron Bramwell held that damages could not be recovered from the Great Western Company, they not being the contracting company.

In *Aldridge* v. *Great Western* (1864) it was a case where empty fruit hampers, Hereford to Tiverton, had been carried free. The Company's terminus was Gloucester, and the hampers were lost on the Midland Railway between Gloucester and Bristol. A carrier, Smith, who signed the Company's conditions, was held to be an agent for both sender and consignee. Chief Justice Erle held it was not a through contract, saying—"To stipulate that under these circumstances they shall not be responsible for loss or delay on the further line seems to us just and reasonable."

In *Stevenson* v. *London and North Western* (1867) a through ticket was issued at Londonderry for Birmingham by the Northern Counties Railway, and there was a notice at the back of the ticket limiting the liability of the Northern Counties Company to their own terminus at Belfast. Plaintiff's trunk was lost on the London and North Western Company's line. Chief

Justice Monaghan held for the purpose of the motion, that the Northern Counties Railway were acting as the agents of the London and North Western Company in issuing the through ticket.

In *Malton* v. *I. N. W.* (1870) a waggon of cattle was booked at Enniskillen to Clones Junction, and paid for to Clones. On the cattle ticket was written "for Lisburn." There was delay at Clones, from whence the cattle went forward by Ulster Railway. The Chief Justice held the contract was only to Clones and gave Judgment for Company.

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9. *Fowles* v. *Great Western Railway Company.*—Action for value of a case of glass, broken at Brompton when being lifted from carrier's cart—Bristol to Paddington. The case turned upon whether the Company contracted to carry Bristol to Paddington, or Bristol to Brompton. The Plaintiff filled up and signed one of the Company's usual consignment notes: "From what Station"—Bristol; "To what Station"—Paddington; "Name and address"—W. H. Forbes, 19, *Montpelier Row, Brompton.* The address was written afterwards in pencil. The 7th and 10th conditions of carriage at back of Company's receipt were as follows:—

"7. The Great Western Company give public notice that all goods received by the Company within the limits of their local regulations for conveyance on their railway will be received and booked without charge for collection, and that all goods addressed to consignees resident within the limits of delivery from the Company's goods station, and respecting which no directions to the contrary shall have been received, will be delivered without any additional charge by the Company at those places."

"10. That all goods addressed to consignee's residence beyond the immediate vicinity of the Company's goods store, and respecting which no directions to the contrary shall have been received previous to arrival at the station house, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer; or they will, at the discretion of the Company by whom they have been received, be suffered to remain on the Company's premises, or be placed in shed or warehouse, if there be convenience for receiving the same, pending communication with the consignees, at the risk of the owners. But the charges of such carrier will be added to those of the Company, and the delivery of the goods by the Company will be considered as complete, and the responsibility of the Company will be considered to have ceased when such

carrier shall have received the goods for further conveyance. And the Company hereby give notice that any money which may be received by them as payments for the conveyance of goods by other carriers beyond their own railway will be received only for the convenience of the senders, for the purpose of being paid to such other carriers, and will not be received as a charge by the Company upon the goods in the capacity of carriers beyond the extent of their own railway. And the Company hereby give notice that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them, if such loss, damage, or detention occur beyond the limits of their respective railways."

The case of glass was safely handed at Paddington to Sherman, a carrier appointed by the Company, for delivery to Brompton; the carriage charged by the Company included the carriage from Paddington to Brompton.

The case was first tried at Bristol Summer Assizes, 1851, before Lord Chief Justice Campbell, who left the case to the Jury, and a verdict was found for Plaintiff. The Company appealed, and on the appeal case Baron Parke said—"I am in favour of the Company, and of the same opinion as the Chief Baron. There is clearly a variance in the description of the place at which the goods were to be delivered. The declaration states that the Company as common carriers undertook to carry the goods from Bristol to Brompton. The contract which depends upon the terms of the receipt note is a contract to carry from Bristol to Paddington. The terms are clear and distinct. The only difficulty arises from the insertion in pencil of the address of the consignee, the person to whom the goods were to be delivered, which is at a place beyond the limits of the railway terminus. But then in the receipt note, under the head of 'To what Station' there is 'Paddington,' and one of the conditions on the other side of the receipt note is that the Company are not to be responsible for the carriage of the goods beyond the limits of their stations. It seems to me that the words in pencil are a mere memorandum of the address of the person for whom the goods are to be carried, and not an alteration of the contract." Chief Baron Pollock, Baron Platt, Baron Martin concurred. Judgment for Company.—*Tried in Court of Exchequer, April 15, 1852.—Law Journal Reports, vol. 22, page 76.*

10. *Jonasshon v. Great Northern Railway Company.*—Action for delay in the carriage of coals in train loads. The

Great Northern Company, by written agreement, undertook to carry the coals from Usworth Colliery, on the York, Newcastle, and Berwick Railway to London, and to supply waggons for the through journey; but the agreement stipulated the condition that the York, Newcastle, and Berwick Company should haul the full and empty trains between Usworth and York. The York, Newcastle, and Berwick Company failed in this duty on their portion of the journey, and Plaintiff contended the Great Northern Company were responsible for the through journey and the consequences of the failure. Baron Platt said—"The Company in the first place agree to carry from the colliery to London. That standing alone would make them liable, but the contract goes on to show that there is a distinction to be taken between 'carrying' and 'hauling.' The Company, in one sense, carry the whole way by providing the carriages, but another Company is to haul part of the way. If any doubt could exist on the first part of the contract it is removed by the subsequent express condition, making the basis of the contract the conveyance by the York, Newcastle, and Berwick Company." Judgment for Company. Chief Baron Pollock and Barons Parke and Anderson concurred.—*Tried in Court of Exchequer, Nov.* 20, 1854.—*From Law Journal Reports, vol.* 24, *page* 31. *Ex.*

11. *Collins* v. *Bristol and Exeter Railway Company.*—Action for £350, the value of a van of sundry luggage and sundry furniture burnt on a truck on a siding at Exeter cause of fire unknown—Bath to Torquay. The Plaintiff, a carrier who was conveying the van in his own name for General James, signed a note at Bath as follows:—"Received the undermentioned goods from R. C. Collins, to be conveyed by Great Western Railway Company on the conditions stated on the other side."

No. 4 of the conditions was that the Company would not be answerable for the loss of or for damage to any goods arising (*inter alia*) from fire, civil commotions, or the act of God.

No. 10 condition.—"All goods addressed to consignees beyond the limits of the Company's local regulations for the delivery of goods from the different stations on the railway, and respecting which no directions to the contrary shall have been received previous to arrival at the station, will be forwarded to their destination by public carrier, or otherwise, as opportunity may offer.

That the charges for such carrier will be added to those of the Company, and the delivery of the goods by the Company will be considered as complete and the responsibility of the Company will be considered to have ceased when such carriers shall have received the goods for further conveyance, and that any money which may be received by them as payment for the conveyance of goods by other carriers beyond the said limits would be so received only for the convenience of the senders, for the purpose of being paid to such other carriers, and would not be received as a charge made by the Company upon the goods in the capacity of carrier beyond the extent of their own railway. And the Company hereby give further notice that they would not be responsible for any loss, damage, or detention that may happen to goods so sent by them if such loss, damage, or detention occurred beyond their own limits."

To reach Torquay the van had to pass over the lines of three different Companies. (1.) The Great Western from Bath to Bristol. (2.) The Bristol and Exeter, Bristol to Exeter. (3.) The South Devon, Exeter to Torquay. The carriage for the whole journey to Torquay was paid at Bath to the Great Western Company. The case was first tried at the Wells Summer Assizes, 1855, before Justice Williams, the Jury found there was no negligence, but a verdict was entered for Plaintiff for £350, the Judge reserving the question on the fifth plea relating to the Great Western Company's not having undertaken a through contract. It was agreed to raise no objection as to the Company having been sued instead of the Great Western Company. On the appeal case, tried in the Court of Exchequer, Feb. 20, 1856, Baron Alderson gave Judgment. The Court held that the contract for the conveyance was one contract, and that it was made with the Great Western Railway Company, and that there were not three separate contracts with the three Companies. The case was decided in exact conformity with the Judgment of the same Court in the case of *Muschamp* v. *Lancaster and Preston Junction Railway Company.* We therefore think no action is maintainable against any of the Companies, and a non-suit ought to be entered. The Company then appealed to the *Exchequer Chamber* when the previous Judgment was reversed, and Judgment given for the Plaintiff.

Justice Crompton, said:—"We cannot agree with the Exchequer Court that the case falls within the principle of the cases where a railway company receives goods for carriage to a place beyond their own line, and are therefore liable for losses on the further line, the Company on such line in effect carrying

as their agents or sub-contractors, and the Exchequer Court assuming this to be the case, treated the stipulations in the 10th condition as repugnant and void. The receipt and 10th condition appear to us expressly framed to prevent the Great Western Company from being in the relation of carriers on the further line. The construction we put upon the 10th condition is that they, the Great Western Company, will not be carriers beyond the extent of their own railway, but that they will receive the entire sum to pay themselves as carriers on their own line, and then will, as forwarding agents, pay the residue, after their own charge, to the next railway or other carrier, being responsible as carriers no further than the extent of their own line. We think that, by the 4th condition (as to fire), the Great Western Company only stipulated as to their own individual responsibility. The Court cannot extend the Great Western Company's contract to the new contract under which the Defendants (Bristol and Exeter Company at Bristol) received the goods. It lies on the Defendants to make out a special contract as to the responsibility on their line, and we think that they fail in attempting to do this. It was said by the Court below the agreement was express by the Great Western Company to carry to Torquay, but the word 'sent' appears probably to have been substituted for the words 'carried' and 'conveyed' for the purpose of avoiding the consequences of the decisions in *Muschamp* v. *Lancaster and Preston Railway* and other cases of that description, and the expression 'sent' is not in the sense we attribute to it repugnant to the stipulations in the 10th condition. One Company may receive and carry for the same rate, with exceptions (special conditions), which another Company may think it better for their own interest to dispense with. The Defendants were bound to make out the goods were to be received and carried on their line on a special contract, excepting losses by fire, and we think that they have failed in so doing. We have no evidence what were the terms on which the goods were to be carried on the Defendants' line, and we must therefore treat them as received to be carried by the Defendants as common carriers, and, consequently, in the absence of a special contract of exemption, subject to responsibility for the loss from fire. We think,

therefore, that the Judgment of the Court of Exchequer must be reversed, and that the verdict should be entered for the Plaintiff for the damages found for him at the trial."—*Tried in the Court of Exchequer Chamber, Nov.* 29, 1856.—*From Law Journal Reports, vol.* 26, *page* 103.

The Company appealed to the House of Lords and succeeded in reversing this decision. Lord Chelmsford said—"I have come to the conclusion that the Judgment delivered by the Court of Exchequer was correct, and ought to have been affirmed. Is there anything in the special terms of the contract made at Bath with the Great Western Railway Company which excludes the application and authority of that case (*Muschamp* v. *Lancashire and Preston Junction Railway Company*)? The question turns upon the true meaning of the 10th condition. It is said that this condition expressly exonerates the Great Western Railway from liability beyond the limits of that Company's own railway, but I cannot understand this to have been its object or to be its effect. It appears to me rather to contain provisions for the *delivery* than strictly speaking for the *carriage* of goods. The 7th condition states the mode in which the Company will deliver goods from the different stations on the railway addressed to places within the limits of the local regulation for delivery. The 10th condition then proceeds to deal with the subject of goods addressed to consignees beyond the limits of the Company's local regulations for *delivery* of goods from the different stations on the railway. After stating that they will be forwarded to their destination by public carrier or otherwise as opportunity may offer, or be warehoused at the discretion of the Company, it goes on—'But the charges of such carrier will be added to those of the Company and the *delivery* of the goods by the Company will be considered as complete, and the responsibility of the Company will be considered to have ceased, when such carriers shall have received the goods for further conveyance.' So I think there can be no doubt that this condition relates to what may be properly termed the delivery of the goods. But it proceeds—'And the Company hereby further give notice that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them if such loss, damage, or detention occur beyond the said limits.'

"These last words clearly mean beyond the limits of the Company's local regulations, and 'beyond the extent of their own railway,' which also in this 10th condition means beyond those stations upon the railway from which the goods are forwarded for delivery by public carrier or otherwise; and the last passage in the condition exonerating the Company from liability for loss which I have just read does not extend to the provision farther. The words 'goods *so* sent by them' can only refer to goods sent, as previously mentioned, for delivery. And again, the words 'beyond their said limits,' apply (as before) to the limit of the Company's local regulations.

"This condition, therefore, appears to me to have no application at all to the present contract, which is for the conveyance of goods that are to be sent by the Great Western Railway to a place on the line of another Company. That the 10th condition was considered to be inapplicable to the contract appears from this, that the charges of the carriers beyond their own limits were not added to those of the Company, but the whole amount is charged by the Great Western Railway Company for the entire journey—Bath to Torquay, and is styled 'the Company's charges.' Considering that the charges upon the other lines may possibly not be the same as those on the Great Western Railway, this appears to be a strong circumstance to show that the Great Western Railway Company took upon itself the whole duty of conveyance of the goods to Torquay. If the true meaning of the 10th condition is that which I have stated, then there is an express contract with the Great Western Railway Company for the conveyance of the goods from Bath to Torquay. The case of *Muschamp* v. *Lancaster and Preston Junction Railway Company* exactly applies." The Lord Chancellor then commented on the fact of the same truck and guard of the Great Western Railway Company going beyond Bristol with the van. He then says—"I think, therefore, the contract was entire, was for the whole journey from Bath to Torquay, was made with the Great Western Railway Company alone, that the goods were carried on the Defendants' railway under the contract, that the Defendants are consequently either not liable at all as no agreement was entered into with them, or that if the contract in any way attaches to them the

exception as to loss by fire accompanies it and exonerates them from liability. In my opinion the Judgment of the Court of Exchequer Chamber ought to be reversed, and the Judgment of the Court of Exchequer affirmed. I may add that my noble and learned friend Lord Brougham, who heard the whole of the argument agrees entirely in this opinion." Lord Cranworth concurred. Lord Wensleydale concurred and said—"It is an ill-penned contract, and it is not surprising that those whose duty it is to construe it should form different opinions upon its meaning." Lord Kingsdown concurred, but said—"the case seems to depend entirely on the construction to be put by the Court on a written contract, and as to that, although not without some hesitation, I acquiesce in the view which has been taken by my noble and learned friends." Judgment for Company.—*Bristol and Exeter Railway Company* v. *Collins. Tried in House of Lords, Feb.* 14, 15, *June* 11, 27, 1859. *From Clerk's House of Lords Cases, vol.* 7, *page* 194; *also Law Journal Reports, vol.* 29, *page* 41, *House of Lords.*

12. *Hayes* v. *South Wales Railway Company.*—Action for £474 13s. 4d., value of 100 pigs shipped by Plaintiff at Cork to be sent to Milford Haven, and thence to London by the South Wales and Great Western Railways. Owing to hazy weather the steamer from Cork could not make Milford, and ultimately put into Dublin. Several of the pigs were dead, and the rest being in a maimed condition, had to be killed, and the carcases were sold for whom it might concern. It appeared in evidence, that over the door of the steam packet office in Cork where the freight had been paid, a sign-board was fixed with the words, "South Wales Railway Company's Office" painted upon it, and a smaller one over the entrance to the cattle-yard adjoining. The freight receipt note was also headed with the words, "The South Wales Steam Navigation Company." It was also proved by persons who had sent cattle to London, that they had been forwarded for freights paid at this place, and that claims made upon the South Wales Company had been discharged at the office in Cork by the shipping agent. Mr. Redmond proved that the steamer was his property, that the shipping agents were paid by him, and that the words

painted on the boards referred to him, and were not sanctioned by the Railway Company. He did admit having made an agreement with the latter for running his boat in conjunction with their line, and dividing the through freights.

Held, that upon the above evidence the Judge was bound to have directed the Jury to find that the Company were joint contractors with Redmond in respect of the entire journey, and were accordingly liable for breaches of contract alleged to have been committed in the conveyance of the pigs by steamer from Cork to Milford. Held also, that independently of the written agreement there was evidence to go to the Jury of said joint liability. Held, that in respect to the sum of money realised by the sale of the carcases of the pigs destroyed on the voyage, the Company were liable for such money in an action for money had and received. Judgment against the Company. —*Tried in the Court of Common Pleas, May and June*, 1859. —*From Irish Common Law Reports, vol.* 9, *page* 494.

13. *Coxon* v. *Great Western Railway Company.*—Action for death of one beast in transit and injury to several others by their having got their legs through holes in the bottom of the truck—Craven Arms to Birmingham. Plaintiff loaded the cattle at Craven Arms Station, on the Shrewsbury and Hereford Railway, into two trucks, one truck (the defective one) belonging to the Great Western Railway Company (Defendants). One of the conditions on the cattle ticket, signed by the Plaintiff, was: "For the convenience of the owner the Company will receive the charges payable to other Companies for conveyance of such cattle over their lines of railway, but the Company will not be subject to liability for any loss, delay, default or damage arising on such other railway."

On arrival of the injured cattle at Birmingham (Great Western) the Plaintiff at first refused them, but on an undertaking from the Company's representative that acceptance of the cattle should not prejudice his claim, he accepted them and estimated his loss at £41. The first trial was at Warwick before Chief Justice Erle, who held that there was no evidence of a contract with the Defendants, and directed a verdict for Company, with leave to Plaintiff to move. At the appeal case

Baron Bramwell said—" I think our Judgment must be for the Company. There is no evidence of any contract with the Great Western either at Craven Arms or at Shrewsbury. The 4th condition cannot be distinguished from the corresponding one in *Collins* v. *the Bristol and Exeter Railway Company*, (33 *Law Times Report*, 287.) The Shrewsbury and Hereford say, indeed, they will not be responsible for any loss beyond their own line, but they do not say they will not carry. There is nothing in the condition to qualify the prior contract between Plaintiff and the Defendants. The declaration is not proved as it stands, and could not be proved even if amended by alleging a contract to carry from Shrewsbury to Birmingham. No doubt it is very inconvenient that persons should be met by such a defence as this, and perhaps an Act of Parliament may be passed to remedy the evil." Barons Martin and Channell concurred.—*Tried in Court of Exchequer, February* 10, 1860."—*From Law Times Reports, vol.* 1, 442.

14. *Aldridge* v. *Great Western Railway Company.*—Action for a quantity of empty fruit hampers, Hereford to Tiverton. The hampers were carried full from Tiverton to Hereford. They were delivered to the Company at Hereford by Smith, a carrier, who was held by the Court to be an agent for both sender and consignee. Smith signed the Company's usual conditions of carriage. The hampers were carried free, and were booked from Hereford to Bristol only. The Company carried the hampers safely to Gloucester and there handed them over to the Midland Railway Company, but they never reached Bristol. The Company's conditions as affecting this case are—(1) The Company will not be answerable for the loss or detention of or damage to wrappers or packages of any description charged by the Company as empties. (2) Nor in respect of goods destined for places beyond the limits of the Company's railway, and as respects the Company their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course of further conveyance. Any money which may be received by the Company as payment for the conveyance of goods beyond their own limits will be so received only for the convenience of the senders, and for

the purpose of being paid to the other carrier. (3) The Company will not be liable for any loss of or injury to articles except on proof that such loss or injury was occasioned by the neglect or default of the Company or its servants. The Company contended that they carried the hampers free and that the special contract made with Smith, an authorized agent of sender's, relieved them of liability. The Plaintiff contended the Company were not gratuitous carriers. Part of the consideration price charged on the full goods is the carriage of the empties back to the place from whence they were sent, being one entire contract. The case was first tried at the London Sittings after Trinity Term, 1863, before Justice Byles. The Jury found for Plaintiff £20 damages. The Company appealed. The Court were to draw inferences of fact, but the power of amendment was reserved. On the appeal case Chief Justice Erle gave Judgment, saying—"It will be unnecessary to discuss the 1st condition (of the special contract) if the second is legal, but as to the 1st condition we may observe, that we are by no means prepared to accede to the suggestion that because no charge is made for the return of the empty packages, therefore the Company necessarily convey them gratuitously. The Company may justly be considered as having had the carriage of the empties prepaid in the shape of the previous payment for the carriage of the same packages when full, including an obligation on the Company to carry the empties back without further charge. We are, however, of opinion the 2nd condition is legal, and does protect the Company. The Company do not thereby attempt to protect themselves from injuries or delay happening on their own line or through the negligence of themselves or their own servants, or even on a further line where they have received any compensation for carriage on that further line. The Company receive the money for the purpose of being handed over to the further carrier. The Company, therefore, when they forward goods on a further line have no control, and receive no payment (on own behalf). To stipulate that under these circumstances they shall not be responsible for loss or delay on the further line seems to us just and reasonable. Suppose the further railway had been paid in money by the Defendants for carrying the empties, then the Company, though they might

have received, yet they would retain no value for the transit on the further line. There was in this case a protection afforded to the Company by a reasonable condition contained in a signed contract within the true meaning of the Railway and Canal Act as interpreted by the House of Lords in *Peek* v. *North Staffordshire*." Judgment for Company, reversing previous verdict.—*Tried in Court of Common Pleas, Jan.* 20, 1864.—*Law Journal Reports, vol.* 33, *page* 161.

15. *Heather* v. *Dublin and Glasgow Steam Packet Company.* Claim £5, boots stolen from a box—Dublin to Aberdeen (for Nairn). Company had no notice of trial, and making no appearance, Plaintiff obtained a verdict.—The Company appealed to Queen's Bench, and the case was tried before Justice Fitzgerald, 19th November, 1875. Company then put in their advertised conditions of carriage—"If goods, live stock, &c., are, for the convenience of shippers or consignees, booked through or addressed for any place beyond the port of the vessel's destination, the Company shall not be held accountable for any loss or damage to same, or for any delay in transmission or delivery, or be in any respect liable for any loss that may happen to them after being landed on the quay or wharf at the port of destination." The Company produced the receipt of the Caledonian Railway Company to whom they delivered the box. The Judge, after examining the receipt, reversed the Recorder's decree.—*Irish Clearing House Reports. Tried before the Recorder in Dublin, and subsequently in Queen's Bench, Ireland.*

IMPLIED SPECIAL CONTRACT.—ACCEPTANCE WITH AN INJUNCTION FROM SENDER THAT THE GOODS MUST BE DELIVERED BEFORE A PARTICULAR TIME FOR A PARTICULAR EVENT, AS A RACE MEETING, SHOW, OR OTHERWISE.

	Case No.		Case No.
Streeter v. *Horlock* (1822)	16	*Sharp* v. *North Eastern* (1866) ...	159
Anderson v. *C. and H.* (1853) ...	730	*Woodger* v. *Great Western* (1867)	144
Snead v. *S. and H.* (1855)	677	*Horn* v. *Midland* (1872)	255
Gee v. *Lanc. and York.* (1860) ...	140	*Cork D. Co.* v. *G. S. & W.* (1874)	227
Hales v. *L. and N. W.* (1863)...	142	*Simpson* v. *L. and N. W.* (1876)	151

DIGEST.

In *Streeter* v. *Horlock* (1822) Justice Park held that the notice to make delivery at a particular time, and the assent to do so constituted a special contract.

In *Anderson* v. *Chester and Holyhead* (1853) horses, Dublin to Shrewsbury, were delayed. Plaintiff contended the Company's clerk made a special contract to have the horses in Shrewsbury in time for the fair. The Chief Justice, in charging the Jury, decided as a point of law that Thomas Jones, the clerk, placed in the position in the Company's office, taking money from the public for carriage of goods and cattle, had inferentially authority to bind the Company by such a special contract. Judgment, on appeal, was against the Company.

In *Snead* v. *Shrewsbury and Hereford* (1855) cattle, Leominster to Stamford, delayed. Lord Campbell told the Jury that if the Station Master made a verbal contract, the action was maintainable, and could not be done away with by the subsequent printed notice after the verbal contract had been entered into and after the cattle were loaded.

In *Gee* v. *Lancashire and Yorkshire* (1860) cotton was delayed seven days, Liverpool to Oldham. The

cotton was required to start a new mill. The Company had no proper notice for what special purpose the cotton was required. The Chief Baron held that "no man is responsible for any damage he has not reasonable means of foreseeing and guarding against."

In *Hales* v. *London and North Western* (1863) a Forester's regalia was sent on hire (£20), London to Seaham Harbour, for a procession on a particular day. The regalia arrived too late. The Jury gave a verdict for £25 (£5 for personal expenses in looking after and tracing the goods). Chief Justice Colborn, on appeal, reversed the decision as to the £20, reducing the damages to £5. Where no time is mentioned for delivery of goods carried, the obligation of the carrier is to deliver within a reasonable time, and that is a question of fact.

In *Sharp* v. *North Eastern* (1866) plums, Wetherby to Colne. Plaintiff contended the Station Master understood the plums should arrive in time for the Saturday's market. This was denied, but on the way-bill was the remark "Forward immediately, wanted for market on Saturday morning." The North Eastern Company's line ends at Leeds, where the plums arrived at 5.45 p.m. Friday, and were not carted across to Midland Company's station until after 8 p.m., when the Colne train had left. Company held negligent, seeing the remark on way-bill, not to have carted the plums in time for Colne train. Judgment against Company.

In *Woodger* v. *Great Western* (1867) Justice Lush in this case told the Jury—"If you want to make a carrier liable for negligence in delivering goods you must give the carrier notice of what you want the goods for, that you want them at a given town by a given day, then you put on him extra care. It has been long decided that if you deliver a package to a carrier to carry without telling him of any extraordinary consequences that will ensue to you if it is not delivered by a given time, you cannot recover any special damages arising from delay."

In *Horn* v. *Midland* (1872) military shoes, Kettering to London, were delivered twenty-four hours late, and beyond the time sender had contracted to make delivery. The French and Prussian war having ended the shoes were refused. Senders advised the Station Master they were under contract to deliver by 3rd February, whereas delivery was not made until the 4th February. Justice Willes said—"It is impossible to say that the Company's officer assented to be answerable for the particular damage (1s. 3d. per pair). There was a penalty (refusal of goods) for non-delivery in the contract between the sender and the consignee of which the Company had no notice, and of the origin and circumstances of which they had no notice. The Company's officer ought to have been informed of the circumstances under which it became material that they should be delivered."

In *Cork Distillery Company* v. *Great Southern and Western* (1874) 20 puncheons whiskey were consigned to "Stein & Co.," also to "Customs Warehouse." Stein & Co. got possession of the whiskey and never paid the duty, £1,360, and senders were liable for it. Lord Cairns in House of Lords held that such a contract could have been made by senders with the Company not to deliver to Stein & Co., but "to establish such a contract we must be able to find that the position of the Distillery Company was actually and clearly made known to the Railway Company. But there is not a word that I can find in the special case which states that the Railway Company had such notice. And if they had not such notice then the case returns into the condition of a case without any special circumstances brought home to the knowledge of the carriers."

In *Simpson* v. *London and North Western* (1876) cattle spice was consigned, Bedford to Newcastle, and on the consignment note was remarked "Must be at Newcastle, Monday certain," and sender explained to the Company's clerk the goods were wanted at New-

castle at that time for a Show there. Chief Justice Cockburn said—"Where the intended use and application of the thing to be carried was expressly brought to the notice of the carrier, or could reasonably be inferred from the circumstances known to him, so that this special use or application might fairly be considered to be within the contemplation of both parties to the contract, the consignee is entitled to a breach of this contract by the carrier, to recover the damages naturally resulting from his being unable to use or apply the goods. The Company, however, might have refused to make such a contract."

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16. *Streeter* v. *Horlock.*—Action for £50, for delay in carrying and making delivery of 50 qrs. of wheat by barge from St. Lawrence to West Thurrock Mill before 9 o'clock on Saturday, the 15th September, 1822, the carrier having undertaken to perform same. The case was first tried before Baron Wood, at Chelmsford Assizes, when the Jury gave a verdict for £50. The carrier appealed, and on the appeal case, Justice Park said—"We are of opinion Plaintiff must succeed, on the ground that where an order is given previously to the delivery of the goods to a carrier to deal with them, when delivered in a particular manner, to which he assents, and afterwards the goods are accordingly delivered to him, a duty arises on his part upon receipt of the goods to deal with them according to the order previously given and assented to, and the law infers an implied promise by him to perform such duty." Judgment against carrier.—*Tried in Court of Common Pleas, June* 25, 1822.—*From Moore's Reports, vol.* 7, *page* 283.

A Railway Company's Carting Agent's Carter held to be a Company's Servant.

Case No.

Machin v. *London and South Western* (1848) 88

DIGEST.

In *Machin* v. *London and South Western* (1848) the Company's carting agent's carter stole a bale of silk value £150. Chief Baron Pollock said—"Chaplin and

Horne must be considered as the servants of the Company, and anybody whom Chaplin and Horne employed for the purpose of delivering these goods were also the servants of the Company, and it makes no difference that by reason of some contract between the Company and Chaplin and Horne the Company have not the power of dismissing such servants.

ACCEPTANCE OF CONTRACT WHEN CARRIER'S SERVANTS COLLECT GOODS FROM SENDER'S PREMISES.

	Cases No.		Case No.
Clayton v. *Hunt* (1811)	72	*Hart* v. *Baxendale* (1851) ...	90
Boys v. *Pink* (1838)...	17		

DIGEST.

In *Clayton* v. *Hunt* (1811), which was in the old carriers time, Hunt had a printed notice stuck up in his office at Oxford where the business of the waggon was transacted, cards of a similar purport had been circulated about the town, an advertisement had been published in the Oxford newspapers, *but there was no notice on the cart* which went round to receive goods, and there was no evidence that any of the cards or advertisements had ever been seen by Plaintiff. The box that had been lost had been collected by the carrier's cart. It was held on appeal that the notice in the office ought to be in such large characters that no person delivering goods there can fail to read it without gross negligence.

In *Boys* v. *Pink* (1838) Chief Justice Denman held that the carrier's man who, at the request of the sender went to sender's house to fetch the box to the carrier's booking office, was for the time the sender's servant. It is very questionable now, seeing that carriers hold themselves out to collect from sender's premises, if this decision would be applicable.

In *Hart* v. *Baxendale* (1851) goods over £10 in value were collected from sender's premises, and the

value was undeclared. Judge Patteson on appeal held that the declaration must be made by sender's whether the goods were accepted at the carrier's office or elsewhere.

From year to year railway companies by the aid of their own carts which collect and deliver, are becoming contractors for the transit of goods from sender's door to consignee's door. The acceptance of the contract of carriage by the carter at sender's door and the absence of any notice on the cart of the conditions upon which the Company carry goods leaves the carrier pretty much upon his "common law" liability, unconditionally, except in a case like *Hart* v. *Baxendale.* The time may not be far distant when this point may become a question of contest, and therefore in anticipation of this event I would suggest the use of an adhesive stamp as here given, which should be used by the carter when giving the receipt, in the same manner as a money receipt stamp is now used.

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17. *Boys* v. *Pink.*—Action for £136, value of a box of engravings damaged by wet, Bristol to London, by road carrier. The value of the box was not formally declared, and the carriage charged was 9s., whereas if insured it would have been 12s. 6d. Sender called at Defendant's office and asked that the box might be fetched from his house, which was done. Chief Justice Denman in summing up, said—"It appears that sender went to the carrier's and asked to have the box sent for, which was done, and I think for this purpose the sender made the carrier's servant *his* servant, and for this purpose we must take it that the goods

were delivered by the sender at the carrier's booking office. It is quite manifest that no formal declaration of the value was made and no extra carriage paid. It is probable that the carrier had a conviction as to what the contents of the box were, but it is not for us to make equivalents for that which is required by the Act of Parliament." Verdict for Carrier.—*Tried in Court of Nisi Prius, February* 5, 1838, *before Chief Justice Denman.—From Carrington and Payne's Reports, vol.* 8, *page* 361.

FALSE DECLARATION OF CONTENTS OF PACKAGES TO EVADE PAYMENT OF THE PROPER TOLLS. DESCRIBING PACKAGES CONTAINING GOODS AS BEING EMPTY, OR DECLARING LESS THAN THE ACTUAL WEIGHT TO EVADE PAYMENT OF THE PROPER TOLLS. NEGLECTING TO DECLARE "DANGEROUS GOODS" AS SUCH.

	Case No.		Case No.
Hearne v. *Garton & Stone* (1859)	18	8 & 9 *Vic. c.* 208, *s.* 98 *and* 99.	
Great Eastern v. *Cobb* (1874) ...	19	*Great Eastern* v. *Aarons* (1875)...	21
Great Eastern v. *Banham* (1874)	20		

FORM OF NOTICE USED BY MIDLAND GREAT WESTERN RAILWAY COMPANY.—Senders of goods are respectfully requested to comply with the terms of the 98 and 99 secs. of the 8th and 9th Vic., cap. 20, and in all cases truly to describe the contents of parcels of merchandise. Also, that the transmission of goods in parcels described as empties is a violation of the terms of the section, either of which subjects the senders to a penalty of Ten Pounds.

8 & 9 *Vic., cap.* 20, *secs.* 98 *and* 99.—"Every person being the owner, or having the care of any carriage or goods passing or being upon the railway, shall, on demand, give to the collector of tolls, at the places where he attends for the purpose of receiving goods or of collecting tolls for the part of the railway on which such carriage or goods may have travelled or be about to travel, an exact account in writing, signed by him, of the number or quantity of goods conveyed by any such carriage, and of the point on the railway from which such carriage or goods have set out, or are about to set out, and at *what point* the same are intended to be unloaded or *taken off the railway;* and if the goods conveyed by any such carriage, or brought for conveyance as aforesaid, be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any such tolls.

"If any such owner or other such person fail to give such account, or to produce his way bill or bill of lading to such collector or other officer or servant of the company demanding the same, or if he give a *false account*, or if he unload or take off any part of his lading or goods at any other place than shall be mentioned in such account, with intent to *avoid the payment of any tolls* payable in respect thereof, he shall, for every such offence, forfeit to the

company a sum not exceeding Ten Pounds for every ton of goods, or for any parcel not exceeding one hundredweight, and so in proportion for any less quantity of goods than one ton, or any parcel exceeding one hundredweight (as the case may be), which shall be upon any such carriage; and such penalty shall be in addition to the toll to which such goods may be liable."

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18. *Hearne* v. *Garton and Stone.*—Action for sending a carboy containing oil of vitriol without declaring same as dangerous goods, being an offence against section 168 of the 5 and 6 of William IV., cap. 107, Great Western Railway Act. The appellant, Hearne, is a servant of the Great Western Railway Company. On the 24th March, 1859, Garton and Stone, carriers (Defendants), were directed to convey four wooden cases from the house of Mr. John Martin Nicholas to the railway at Bristol, consigned to Auckland, New Zealand; to be sent to London. The sender, Mr. Nicholas, stated the cases contained gun-stocks, seeds, and a few corks. Neither Garton and Stone nor the Railway Company knew that the cases contained vitriol. When the cases at Paddington were being placed on a cart for delivery, smoke was seen issuing from one of the cases, and on its being unpacked it was found to contain two carboys of oil of vitriol which had been broken, and which burned the straw in which the carboys had been packed. Two other cases were also found to contain each two carboys of oil of vitriol in an unbroken state, and the fourth case contained japanned wares and some corks, but there was no gun stocks in either case.

The case was first tried before the magistrates, who did not consider Garton and Stone liable under the Act, seeing that they only acted as carting agents and were not acquainted with the contents of the cases.

On the appeal case Chief Justice Lord Campbell said—"I must say that I think the Justices were clearly right. What they have done is very satisfactory. I read what they say:—

'We were of opinion upon the foregoing state of facts that the Respondents did not send the goods within the meaning of the 168th section of the Act, but that they acted as consignees of Mr. Nicholas, against whom the Company should have proceeded as the person who caused the said goods to be sent.'

"I do not say whether they might or might not have done so, but then the justices go on to say—

'We are also of opinion that to establish an offence within the meaning of the said 168th section it is necessary that there should be a *guilty* knowledge,' and then they find that there was no guilty knowledge. On that reason they were perfectly justified in their finding for *Actus non facit reum nisi mens sit re.* This is an offence created by Act of Parliament, and it is treated as an offence for which the person who commits it is liable to be fined and imprisoned. It appears that not only was there an absence of all proof of guilty knowledge on the part of Garton and Stone, but the presumption of such guilty knowledge, if there be any, was rebutted, for they proved that they were imposed upon by Nicholas. A fraud was practised upon them quite as much as if after a quantity of safe and innocuous goods had been packed up, other goods of a perilous nature had been imposed upon them. They have therefore rebutted the presumption that they knew the nature of the goods which were sent, and have proved that there was no negligence on their part, for they used all diligence by making enquiries to ascertain the contents of the packages. They have very good reason to complain of the conduct of Nicholas, and are they to be his victims? I am inclined to think that they are the senders and civilly liable to the Company, for they clearly sent the goods, but I am also clearly of opinion that they are not criminally liable, and that it was an improper thing to initiate these criminal proceedings against them. I think also that upon the fact stated Nicholas was the guilty man, and that he was the person who ought to have been proceeded against." Justices Wightman, Crompton, and Erle concurred. Judgment in favour of Defendant.—*Tried in the Court of Queen's Bench, June* 11, 1859.—*From Law Journal Reports, Magistrates Cases, vol.* 28, *page* 216.

19. *Great Eastern Railway Company* v. *Cobb.*—Prosecution under the 8 and 9 Vic. c. 20 (Railway Clauses Act) for declaring a package to be an "empty," whereas it contained clothes—Eccles Road to London. The charge for the "empty" was 6d., whereas seeing that the box contained clothes

the proper charge was 1s. 6d. It appeared the Defendant had been previously cautioned against the practice. The magistrates decided that Defendant should pay 1s. toll, and £4 10s. 6d. costs, together with other charges, a total of £7 1s. 6d., to be levied by distress, in default six weeks' imprisonment in the House of Correction at Norwich. The money was paid.—*Tried at the East Harling Petty Sessions, May* 26, 1874.—*From English Clearing House Reports, No.* 259, *page* 335.

20. *Great Eastern Railway Company* v. *Banham.*—Prosecution under the Railway Clauses Act, 98th, 99th, and 145th clauses, for declaring two packages as "empties," whereas they contained toys, and sender had advised consignee of having returned the toys and claimed credit for their value £1 14s. 2d., Norwich to London. The charge made for the empties was 10d., whereas if it had been known the packages contained goods the charge would have been 2s. 2d. The Company's solicitor stated they felt compelled to prosecute, because during the year they had discovered three hundred of such cases of fraud. The Bench fined Defendant 40s. and £5 15s. 6d. costs.—*Tried in Norwich Police Court, June* 15, 1874.—*From English Clearing House Reports, No.* 263, *page* 340.

21. *Great Eastern Railway Company* v. *Aarons.*—Prosecution under the Railway Clauses Act for false declaration of the weight of goods to defraud the Company of their proper tolls. The consignment consisted of 34 bags rags, Cambridge to London, from Aarons to Harris. The rags were declared as weighing 2 tons 6 cwt., whereas it was proved sender had paid the man from whom he purchased them for 3 tons 5 cwt. 2 qrs. 3 lbs., and they were found by the Plaintiffs to weigh 3 tons 6 cwt. 1 qr. Defendant paid £1 16s. 7d. carriage, whereas it should have been £2 16s. 11d. There were also two other cases—one where 11s. 6d., and the other 11s. 3d., was undercharged owing to the false declaration. The Mayor said the Court would impose the highest penalty, namely, £75 4s. 6d. and costs, or three months' imprisonment, in each case—nine months in all. The Act of Parliament fixed the penalty at a sum not exceeding £10 for each ton of goods

falsely declared.—*Tried at the Cambridge Borough Court in* 1875.—*From English Clearing House Reports* 273, *page* 349.

DELIVERY OF GOODS BY SENDERS TO AN AUTHORISED PLACE WHERE CARRIERS ACCEPT GOODS TO CARRY.

Case No.
Burrell v. *North* (1847) 22

DIGEST.

In the case of *Burrell* v. *North* (1847) Justice Erle held that goods delivered at a road carrier's carter's house, which was held to be a receiving house for goods to be carted between Fulham and London, constituted a delivery to the carrier.

The 1 *William IV., cap.* 68, *sec.* 5, lays it down as follows:—"And be it further enacted that for the purposes *of this Act* every office, warehouse, or receiving house, which shall be appointed by any mail contractor, or stage coach proprietor, or other such common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor, or other common carrier."

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22. *Burrell* v. *North.*—Action for the value of a bed and other articles to be carried from Fulham to London. Susan North proved that a package containing the bed was left by the Plaintiff at her husband's house at Fulham to be carried to London by one of the carts of Defendant, who was a carrier from Fulham to London. She said "We are in the habit of receiving goods for Mr. North to carry. My husband drives one of Mr. North's carts, and ours is a receiving house for parcels to be carried by his carts from Fulham to London. There is no payment made to us." Justice Erle said—"That is immaterial. If the defendant allows these persons to receive goods to be conveyed by him as a carrier, that is quite enough." Verdict against the carrier.—*Tried in Court of Nisi Prius, Nov.* 26, 1847.—*From Carrington and Kirwan's Reports, vol.* 2, *page* 680.

Delivery of Goods by Senders at an Unauthorised Place where Carrier does not accept Goods.

	Case No.		Case No.
Selway v. *Holloway* (1695) ...	23	*Hodgman* v. *West Mid.* (1864) ...	747

DIGEST.

In the case of *Selway* v. *Holloway* (1695) it was held by Chief Justice Sir John Holt that goods left in an inn yard frequented by the carrier was not a delivery to the carrier.

In *Hodgman* v. *West Mid.* (1864) Justice Mellor held—"It appears to me the more reasonable construction is that, so soon as the horse enters the Company's premises for the purpose of being received, forwarded, and delivered, the act of delivery begins, and that if the person sending the horse to be carried desires to be in a position to recover against the Company greater damages than the amount limited by the statute (£50), he must *have made* the requisite declaration of value before the horse was taken to the premises of the Company."

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23. *Selway* v. *Holloway.*—Action for the value of a package of hops. It appeared sender delivered the hops into the yard of an inn where Holloway, the carrier, put up and lodged. Sender's carman saw a woman at the inn (who had served Holloway before, but had quitted his service for five years), who said to the carman if he laid the package down (in the yard) Holloway would find them. The judges held that they were all of opinion that the hops could not be said to be delivered to Holloway, and therefore a new trial was denied.—*Tried in the Court of King's Bench, before Chief Justice Sir John Holt and Justices Sir William Gregory, Sir Giles Eyre, and Sir Samuel Eyre, Trinity Term,* 1695.—*From Lord Raymond's Reports, vol.* 1, *page* 46.

RATES—QUOTATION—SPECIAL, ETC.

	Case No.		Case No.
Winkfield v. *Packington* (1827) ...	24	*Colman* v. *Great Eastern* (1882)...	25
Oxlade v. *North Eastern* (1857)...	272	*Equality Clause, page* 49	—
Garton v. *Bristol & Exeter* (1861)	321		

DIGEST.

In *Winkfield* v. *Packington* (1827) it was held that although the carriers' servant in mistake had quoted the wrong rate, and lower than the proper rate, the carrier was bound by such quotation.

Equality Clause, 8 and 9 Vic., cap. 20, sec. 90 (1845).—"And whereas it is expedient that the Company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly either in the hands of the Company or of particular parties, it shall be lawful, therefore, for the Company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken either upon the whole or upon any particular portions of the railway as they shall think fit, provided that all such tolls be at all times charged equally to all persons and after the same rate, whether per ton or per mile, or otherwise in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular Company or person upon or using the railway.

In *Oxlade* v. *North Eastern* (1857) Plaintiff complained that coal in train loads was carried at a less rate per ton per mile to South Staffordshire than for shorter distances on the local system of the North Eastern Company's system. Justice Cresswell held that a railway company is justified in carrying goods for one person at a less rate than that for which they carry the same description of goods for another, if there be circumstances which render the cost to the Company of carrying for the former less than the cost of carrying for the latter.

In *Garton* v. *Bristol and Exeter* (1861) Plaintiff claimed £160 on the ground that the Company had

not put up any boards to indicate the amount of their tolls (*i.e.*, carriers' charges). The Judge said—"It is very doubtful indeed whether the Company is bound to put up boards at all in respect to the conveyance of *parcels and packages by their own carriages*, but at all events we think that any payments which they received from the Plaintiffs or others on this head cannot be recovered on account of money had and received."

In *Colman* v. *Great Eastern* (1882) the Court of Railway Commissioners held the Trowse Station public rate book showing the terminal charges distinct from the rate in a lump sum was not in accordance with the Act, and that the Act requires the nature and detail of such terminal expenses to be specified.

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24. *Winkfield* v. *Packington, Bart.*—Action by a carrier for carriage of a quantity of trees, London to Hanbury Wharf (Worcestershire). Defendant sent a messenger to the carrier's London office to inquire the rate, and he was quoted 2s. 6d. per cwt., whereas the correct rate was 3s. 6d. per cwt., the clerk making a mistake. Lord Tenterden said—"If a person goes to the office of a carrier and asks what a thing will be done for, and he is told by a clerk or servant who is transacting business there, that it will be done for a certain sum the master can charge no more. It is said that the clerk had no authority to make such a bargain; however, I am of opinion that it signifies nothing in this case whether the carrier's servant did his duty or made a mistake. For if the trees were ent on the faith that they would be taken at a given price, in consequence of what the clerk said, it is quite clear that the Plaintiff can recover no more. Judgment for carrier, but for not more than 2s. 6d. per cwt.—*Tried in Court of King's Bench, May* 29, 1827.—*From Carrington and Payne's Reports, vol.* 2, *page* 599.

25. *Colman* v. *Great Eastern Railway Company.*—Action against a company for not obeying an order of the Railway Commissioners, in accordance with section 14 of the

regulation of the Railways Act 1873 (36 and 37 Vic. cap. 48), in which they were required in their rate book at Trowse Station to distinguish how much of each rate for traffic of the descriptions carried by them for the applicants is for the conveyance of such traffic on the railway, including tolls for the use of the railway, for the use of carriage or other locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses.

The company in obedience to the order gave in addition to the rate for conveyance a list of the various terminal services which they performed for the particular traffic, and stated what their total charge was for the whole of such service.

The applicants took out a summons for the infliction of penalties on the Company for not obeying the Commissioners' orders. The Commissioners delivered the following Judgment:—"We think the information given is not in compliance with our order. The Act of Parliament assumes that a rate consists of two parts, first, a part for the conveyance of the traffic, and, secondly, a part for other expenses, and, as regards the second part, it requires the nature and detail of such other expenses to be specified. The Company have thought it sufficient in this case to give a list of the various terminal services which they perform, and to state merely what their total charge is for the whole of those various services, but not to say how much of that total charge is for each of these services. We think that is not sufficient. We think they are bound to state as regards each rate for traffic in the Trowse rate book to which our order applies, what terminal services or other expenses they undertake to perform with regard to that particular traffic, and how much they charge for each of such terminal services, distinguishing whether the charge is for service at both terminal stations or only at one. The Company will have to pay the cost of this summons."—*Tried in the Court of Railway Commission, June* 15, 1882.—*From Solicitors' Journal, vol.* 26, *page* 534.

ACCEPTANCE OF CONTRACT BY ONE CARRIER FROM ANOTHER CARRIER, GOODS BEING IN TRANSIT.

	Case No.		Case No.
Quiggan v. *Duff* (1836)...	26	*Meade* v. *South Eastern* (1870)...	403

DIGEST.

In *Quiggan* v. *Duff* (1836) Chief Baron Abinger held it to be a question for a jury whether the receiving carrier having accepted a written notice, and having made it a course of dealing with the delivering carrier that goods should be left for him on the particular wharf, whether a delivery had not been made on the lodgment of the advice note.

In *Meade* v. *South Eastern* (1870), flour had been carried from Framlingham to Bromley, in Kent. At London the flour was transferred by cart from the Great Eastern Company to the South Eastern Company. The flour was carried at local rates. During transit on the South Eastern line the flour was injured by being put into a waggon in which tar had previously been loaded. Chief Justice Cockburn, on the first trial, held that there were two distinct contracts, and on the appeal case, Chief Justice Bovill held that the consignee was the right person to sue, and had full power to sue.

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26. *Quiggan* v. *Duff*.—Action for the value of two boxes type carried from London to Liverpool by canal for John Quiggan, Douglas, Isle of Man, care of James Duff, Liverpool, shipping agent. Kenworthy & Co., carriers, carried the boxes to Liverpool and deposited them on the Duke of Bridgewater's wharf at Liverpool. On the day of landing consignee Duff was sent a notice of their arrival and his clerk signed for the notice. Kenworthy & Co. proved that on previous occasions Duff had given them notices to let goods brought by them for him remain on the wharf after their arrival till he sent for them. On the sixth day after the arrival of the boxes

Duff went to get them and they could not be found. The case was first tried before Chief Baron Abinger, who directed the jury to find against Quiggan as there was no proof of delivery to and acceptance by Duff of the goods. Quiggan then appealed to the Court of Exchequer, when Chief Baron Abinger said—"It did not strike me at the trial as material the course of dealing between Kenworthy & Co. and Duff. I therefore think, although the case appeared to me slight, it ought to have gone to the jury on the question whether, inasmuch as Duff by his notices to Kenworthy had in this particular case made the Duke's Wharf his own place of receipt for the goods, he had accepted them, and whether, if so, that was a proper place for leaving the goods so that Duff took proper care of them. These are all questions for a Jury, and therefore I think there must be a new trial." Barons Parke, Bolland, and Gurney concurred.—*Tried in Court of Exchequer, Hilary Term*, 1836.—*From Meeson and Welsby's Reports, vol.* 1, *page* 174.

CARRIERS HAVE NO RIGHT TO OPEN PACKAGES OF GOODS TO ASCERTAIN THE CONTENTS.

	Case No.		Case No.
Crouch v. *L. and N. W.* (*March*, 1849.)	376	*Crouch* v. *L. and N. W.* (*January*, 1854.)	380

WHERE A BOOKING-OFFICE KEEPER (RECEIVING HOUSE) IS OR IS NOT A CARRIER'S AGENT.

	Case No.		Case No.
Story on Bailments, *S.* 536... ...		*Symes* v. *Chaplin* (1836)	30
Newborn v. *Just* (1825)	27	*Gilbart* v. *Dale* (1836)	31
Upston v. *Slack* (1827)	28	*Minor* v. *L. and N. W.* (1856) ...	387
Colepepper v. *Good* (1832)	29		

DIGEST.

In "Story on Bailments," section 536, page 519, it is stated:—"In all cases the material point upon which the controversy hinges is, whether the one character or the other character predominates in the particular stage of the

transaction. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customer so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier begins with the receipt of the goods. So if an innkeeper is at the same time a carrier, and goods are sent to his inn and received by him for transportation, he is liable as a carrier for any loss before they are put upon their transit."

In *Newborn* v. *Just* (1825) the Sidcup carrier proved he did not get the box from the booking-office keeper; the keeper was made liable on the ground of negligence at common law.

In *Upton* v. *Slack* (1827) the booking-office keeper was sued as a common carrier. Chief Justice Lord Tenterden said—"That seeing there were many receiving houses in London not belonging to carriers, plaintiff could not convert the keeper of a booking-office into a carrier."

In *Colepepper* v. *Good* (1832) the carrier for seven years had been calling day by day at a booking-office and taking up goods. The booking-office keeper was held to be his agent for collection of parcels.

In *Symes* v. *Chaplin* (1836) a mail coach regularly called at an inn at Melksham and took up parcels. The innkeeper was held to be the carrier's agent for receiving parcels.

In *Gilbart* v. *Dale* (1836) Justice Williams said—"Here the contract (of booking-office keeper) was to deliver the goods to a carrier, and the evidence leaves it undecided whether the goods were lost in the defendant's hands or were delivered to a carrier and lost by him." Judgment for booking-office keeper.

In *Minor* v. *London and North Western* (1856) Justice Williams said—"The Court is of opinion that the Company did not carry on business at Union Street, Southwark, at the office of Pickford & Co., but that Pickford & Co. carried on the business of railway agency to the Defendants and several other Companies." Judgment for Company.

27. *Newborn* v. *Just.*—Action for a trunk, value over £5. The trunk was for Sidcup in Kent, and was delivered at the "Spotted Dog" receiving house in London, and the action was against the keeper of this house. The carrier to Sidcup being called, proved that on the day in question (26th March) he did not get the trunk. Defendant then pleaded the carrier's notice of goods valued over £5 when not declared, and that not being bound to receive parcels at all he might by contract limit his liability. Chief Justice Best said—"I think the notice will not assist you, you are not in the situation of a carrier. You are not an insurer; this notice is to protect from insurance. But it has been decided over and over again that notice does not protect a carrier against negligence, and Defendant can only be liable for negligence. Defendant, if he desires to limit his liability must give distinct notice to that effect, and if the public were told that he would not be liable for the negligence of himself or his servants he would not have many persons to trust him." Verdict for Plaintiff.—*Tried in Court of Nisi Prius, June* 23, 1825.—*From Carrington & Payne's Reports, vol.* 2, *page* 76.

28. *Upston* v. *Slack.*—Action for the value of a box lost. Defendant kept a booking-office in Piccadilly, his name was painted over the door, and on a board at the side of the door was painted, "Conveyances to all parts of the world," followed by a list of names of places, including Windsor, where the box was to have gone. Chief Justice Lord Tenterden said—"There is no proof that the Defendant is a carrier, the Plaintiff has declared against him as a carrier. We know that there are in this town booking-offices that do not belong to the carriers, and I am clearly of opinion that you cannot convert the keeper of a booking-office into a carrier." Plaintiff non-suited.—*Tried in Court of King's Bench, Easter Term, May* 21, 1827.—*From Carrington & Payne's Reports, vol.* 2, *page* 598.

29. *Colepepper* v. *Good.*—Action, £39 for loss of a chest. The chest was delivered and booked at the White Hart, Tower Street, London, addressed to "F. Colepepper, Bromley Hall Cottages, Bromley, nr. Bow." Defendant, a carrier, called for the last seven years at this booking-office to take up goods.

Defendant's man called and took up the chest, which then had on it the address of Mr. Chaplin, to be left at the "Three Mackerel," Mile End Road, "till called for." The chest being on the tail of the cart, the carter took off the address for fear it might be lost and put it into his pocket. The chest was delivered at the "Three Mackerel," where two unknown men subsequently called and took it away. The carrier contended he was not liable. The Judge said—"The first question is whether the booking-office keeper was or was not the agent or servant of the carrier, for if he was, then the carrier will be liable to answer for his negligence. Another question was, whether the direction was altered before the goods were delivered to the carrier's carter or not. If a carrier has directed goods to be sent to a particular place, I think that the party sending them has, in point of law, a remedy against him for any misconduct on the part of the booking-office keeper. It will be for you to say whether in this case the course of conduct of the carrier calling from day to day for seven years does or does not satisfy your minds that the booking-office keeper was his agent. I agree that where a booking-office keeper has misconducted himself the party injured may maintain an action against him; but it does not follow that he may not also maintain an action against the carrier." The Jury thought that the booking-office keeper was the agent of the carrier, and that the direction was right when the chest was delivered to the carrier. Verdict against the carrier for £39.—*Tried at Adjourned Sittings in London, June* 30, 1832.—*From Carrington and Payne's Reports, vol.* 5, *page* 380.

30. *Symes* v. *Chaplin.*—Action for £25 for loss of a parcel containing a certificate of bankruptcy of the Plaintiff—Bradford to London. The parcel was delivered to the postmaster of Bradford to go by the mail coach, and 2d. booking was paid. The parcel was sent by mail cart six miles to Melksham to meet the mail coach to London. The Innkeeper at Melksham for two years had been in the habit of receiving parcels for the mail coach, as well as for other coaches. The parcel was entered in the booking-book at Melksham, and subsequently delivered to the guard of the mail and entered on the way bill of the day,

but it never reached its destination. The case was first tried at the Assizes for the County of Wilts before Justice Williams, and a verdict given for £25. The carrier appealed, and contended no contract was made with him, nor was the value declared as over £10. Chief Justice Lord Denman, said—"He could not entertain a doubt but that the inn at Melksham was the office, warehouse, or receiving-house of the Defendant. It was a house for the reception of all parcels which might be left there to be conveyed to their respective places of destination by the different coaches which were accustomed to stop there. There was an adoption by the Defendant of the inn as a receiving-house. As to the declaration, the jury found that the parcel was delivered at the receiving-house of the defendant, and *non constat*, but that when it was so delivered notice was given of the value." The other Judges concurred. Judgment for Plaintiff.—*Tried in Court of King's Bench, November* 15, 1836.—*From Law Journal Reports, vol.* 6, *page* 25; *also in Adolphus and Ellis' Reports, vol.* 5, *page* 634.

31. *Gilbart* v. *Dale.*—Action for the value of a box of new clothes delivered to Defendant, a proprietor of a general booking-office at Gloucester Coffee House, Piccadilly. The box was booked, and 2d. paid for booking. No direction was given as to any particular conveyance. Justice Williams, on appeal, said—"A carrier must discharge himself of his contract by delivering the goods to the consignee. Here the contract was to deliver them to a carrier, and the evidence leaves it undecided whether the goods were lost in the Defendant's hands, or were delivered to a carrier and lost by him. There is, therefore, no sufficient proof of negligence in the Defendant." Judgment in favour of booking-office keeper.—*Tried in Court of King's Bench, Nov.* 8, 1836.—*From Adolphus and Ellis' Reports, vol.* 5, *page* 543.

AN ALTERATION OF AN ADDRESS ON GOODS OR A CONSIGNMENT NOTE BY A CARRIER'S SERVANT REQUIRES SENDER'S KNOWLEDGE AND CONSENT.

	Case No.
Watson v. *Ambergate, N. and B.* (1850)	6

DIGEST.

In *Watson* v. *Ambergate, Nottingham, and Boston* (1850) the Company's servant altered the address on a package from "Paid to Bristol" to "Paid to Nottingham," the farthest point in the direction of Cardiff to which the Station Master had rates; the Company were, however, still held liable for the through contract to Cardiff.

A SENDER OF GOODS IS NOT COMPELLED TO USE THE COMPANY'S CONSIGNMENT NOTE WITH PRINTED CONDITIONS THEREON, WHEN ANY OF SUCH CONDITIONS ARE UNJUST AND UNREASONABLE.

	Case No.		Case No.
Garton v. *B. and E.* (1861) ...	321	*Baxendale* v. *B. and E.* (1862) ...	322

DIGEST.

In *Garton* v. *Bristol and Exeter* (1861) the Company refused to receive certain goods with Plaintiff's consignment note, and required him to sign the Company's printed form of consignment note with certain printed conditions thereon. Chief Justice Cockburn held that as some of the conditions on the note had been held "unjust and unreasonable," the Company were not warranted in their act. Judgment against Company.

In *Baxendale* v. *Bristol and Exeter* (1862) the Company required Plaintiff to use and sign their printed form of consignment note with "conditions" attached. Mr. Wall, the Company's carting agent, who also kept a receiving-house in the city of Bristol, did not require

the public bringing him goods as the Company's agent to use and sign such notes. Judgment against the Company.

ACCEPTANCE IN RESPECT TO THE LIABILITY OF COLLECTION AND DELIVERY, AND ACTING AS COMMON CARRIERS BEYOND AND OFF THE RAILWAY.

	Case No.		Case No.
Baxendale v. *Great Western* (1863)	305	*Baxendale* v. *London and South Western* (1866)	306

DIGEST.

In *Baxendale* v. *Great Western* (1863) the action was for cartage allowance in London and country stations on parcels under 500 lbs. weight, which the Company refused to allow the carriers, preferring to perform the service of collection and delivery themselves. By the Company's Act, 7 and 8 Vic., cap. 3, sec. 51, they had power as follows:—"And it shall be lawful for the said Company to enter into and make such arrangements as they may see fit with any Company or person with regard to the collection of such goods, &c." By Section 53 the Company could make any charge they think fit for parcels under 500 lbs. The majority of the Court held that cartage allowance as claimed must be made to the carriers out of the rate which included such services. Chief Justice Erle dissented.

In *Baxendale* v. *London and South Western* (1866) Baron Channell said—"The Company are clearly entitled to do what they profess to do, viz., to carry on the business of *common carriers* from London to Newport, Isle of Wight, using their line for that purpose as far as it is available, that is, from London to Southampton, and acting as *common carriers* off their line beyond the Southampton terminus."

DANGEROUS GOODS.

	Case No.		Case No.
Crouch v. *L. and N. W.* (*January*, 1854)...	380	8 *Vic., cap.* 20, *sec.* 105. *Biggs* v. *Mitchell* (1862)	32
Hearne v. *Garton & Stone* (1859)	18		

DIGEST.

In *Crouch* v. *London and North Western* (January, (1854) Chief Justice Jervis said—"No authority has been cited to show that a carrier is entitled in every case to know the nature and quality of the goods tendered to him to be carried, and on looking at the other provisions of the Act there seems to be no reason why the Company should make the inquiry. With reference to dangerous articles they are entitled by the Act to know their nature and quality, and such must be discovered to them at the time of the delivery; and if the Company suspect articles to be of a dangerous nature they may open the packages."

The 8th Victoria, cap. 20, *sec.* 105.—No person shall be entitled to carry or to require a company to carry upon the railway any aquafortis, oil of vitriol, gunpowder, lucifer matches, or any other goods which in the judgment of the Company may be of a dangerous nature, and if any person send by the railway any such goods without distinctly marking their nature on the outside of the package containing the same, or otherwise giving notice in writing to the book-keeper or other servant of the Company with whom the same are left at the time of so sending, he shall forfeit to the Company £20 for such conveyance, and it shall be lawful for the Company to refuse to take any parcel that they may suspect to contain goods of a dangerous nature, or require the same to be opened to ascertain the fact.

32. *Biggs* v. *Mitchell.*—Action in respect to dangerous goods. The mere having a quantity of gunpowder greater than the quantity allowed by the 11 and 12 Geo. III., cap. 61, sec. 11 in a carrier's warehouse as a temporary halting place in the course of its transit, for a not unreasonable time, for the purpose of such transit, is not such a "having or keeping" as to constitute an offence under the said section.—*Tried in the Court of Queen's Bench, April* 26, 1862.—*From Weekly Reporter, vol.* 10, *page* 559.

Acceptance of Passengers' Luggage.

	Case No.		Case No.
Munster v. *South Eastern* (1858)	449	*Ayrell* v. *L. and N. W.* (1875) ...	450
Stevenson v. *L. and N. W.* (1867)	448	*Bergheim* v. *Great Eastern* (1878)	453

DIGEST.

In *Munster* v. *South Eastern* (1858) Chief Justice Cockburn said—"The Act of Parliament renders it imperative on the Company to carry a certain weight of passengers' luggage. The Company are empowered to make regulations, and by one the Company say they will not be responsible for luggage that is not marked with their label, and properly addressed. It is impossible not to see that the question was whether the Company by refusing to label could divest themselves of their common law liability. These articles were wearing apparel, and the Company were liable to carry them." Judgment against Company.

In *Ayrell* v. *London and North Western* (1875) Plaintiff on arrival at Victoria Station, Manchester, had his portmanteau taken from the cab to the platform by a Company's porter. The porter left the portmanteau close to the rack where the luggage labels were kept. The passenger remained with the luggage some minutes and then went to the refreshment room, and on his return the portmanteau was stolen. The act of the porter was not held to constitute such an acceptance of the portmanteau as to render the Company liable for its loss.

In *Bergheim* v. *Great Eastern* (1878) a bag had been put into the carriage by the passenger's request, and was stolen therefrom before the train started. On appeal Lord Justice Cotton held the Company had not undertaken the liability of common carriers, that is to have contracted to become insurers of the bag. Judgment for Company.

EXCEPTIONS TO CARRIERS' LIABILITY.

COMMON CARRIERS CAN ONLY BE HELD LIABLE TO CARRY TO SUCH PLACES AS THEY MAY HOLD THEMSELVES OUT TO BE COMMON CARRIERS TO AND FROM, AND ONLY TO CARRY SUCH KINDS OF GOODS AS THEY PROFESS TO CARRY.

	Case No.		Case No.
Johnson v. *Midland* (1849) ...	33	*Oxlade* v. *North Eastern* (1861)...	34
Crouch v. *L. & N. W.* (1854) ...	380	*Oxlade* v. *North Eastern* (1864)	279
Munster v. *South Eastern* (1858)	449	*Northampton Gas* v. *London & North Western* (1868)	770
M'Manus v. *Lan. & York.* (1859)	739		

Any person holding himself out to the public as a common carrier is held by law to make a public profession to the public to become a public servant in respect to the carriage of goods or passengers, and can be required to fulfil that engagement with certain exceptions hereinafter mentioned.

DIGEST.

In *Johnson* v. *Midland* (1849) Baron Parke held—"That it did not appear in evidence the Company ever made a public profession to carry coal from Melton Mowbray to Oakham, hence they could not be required to carry it."

In *Crouch* v. *London and North Western* (1854) Chief Justice Jervis held—"The Company profess to carry goods from London to Glasgow, and they are liable for refusing to accept goods for Glasgow."

In *Munster* v. *South Eastern* (1858) it was held the Company were bound to take charge of a shawl package of a passenger which he refused to take into the carriage with him.

In *M'Manus* v. *Lancashire and Yorkshire* (1859) Justice Erle held—"A carrier's duty to receive and his right

to reject, in some cases absolutely, in others conditionally, without regard to the will of the customer, and, therefore, without special contract, remained as before the passing of the Carriers Act, 11 Geo. IV., and 1 Will. IV., c. 68."

In *Oxlade* v. *North Eastern* (1861) the Company at Shincliffe Station exhibited a list of tolls which contained coal; they, however, refused to carry coal in bulk from that station. On appeal Chief Justice Erle said—"The Company say they have not accommodation at the station to enable them to carry on a coal traffic, and although they may have carried samples of coal from it that is no evidence of their having held themselves out as common carriers of coal in bulk from Shincliffe."

In *Oxlade* v. *North Eastern* (1864) the Company declined to carry coal for individuals, and confined the carriage to colliery owners. Chief Justice Erle said—"I think the Company have a perfect right to say that they will carry coal only for colliery owners. For the reasons alleged by them in their affidavits it is evident that they could not have the same control over the traffic if they carried coal for the general public."

In *Northampton Gas Light Company* v. *London and North Western* (1868) from an accident to the axle Plaintiff's coal waggon broke down, and the coal was lost. It was held that the Company were not liable for the loss of the coal, not being common carriers of coal.

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33. *Johnson* v. *Midland Railway Company.*—Action to require that the Railway Company should be compelled, as common carriers, to convey coal between Melton Mowbray to Oakham. Formerly a canal existed between the two points, the Company purchased the canal, and, by Act of Parliament, closed it. Plaintiff took five tons of coal to the station yard at Melton Mowbray and left them with directions to convey them to a person at Oakham, tendering amount of carriage. The Company refused to carry them,

stating as the fact was that they had no waggons or other conveniences at Melton Mowbray for the loading and conveyance of coals to Oakham. The case was tried at the Leicester Assizes before Judge Maule, and a verdict was found for Plaintiff with nominal damages, with leave to appeal. The case then came before the Court of Exchequer, Trinity Vacation, 1849, when Baron Parke gave Judgment, and said—"At common law a carrier is *not* bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession. Whenever a subject takes upon himself a public trust for the benefit of his fellow subjects, he is bound to serve the subject in all the things that are within the reach and comprehension of such an office under pain of an action against him. (*Lane* v. *Cotton*, 12 Mod., 484.) If on the road a shoe fall off my horse I come to a smith to have one put on, and the smith refuse to do it an action will lie against him, because he has made profession of a trade which is for the public good, and has therefore exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade (*Keilwey* 50, pl. 4). If an innkeeper refuse to entertain a guest when his house is not full an action will lie against him (*Dy.* 158, *Godb.* 346), and so against a carrier if his horses be not loaded and he refuse to take a packet proper to be sent by a carrier. A carrier may profess to carry a particular description of goods, say cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carry between certain points and not intermediate. Until he *retracts* every person (provided he tenders the money at the time there is room in the conveyance) has a right to call upon him to receive and carry goods according to his public profession. It does not appear in evidence the Company ever made a public profession to carry coals from Melton Mowbray to Oakham, and it is found they had no convenience for so carrying. The Act shows a right in the public to carry and convey goods as well as the Company. That right has proved practically useless, but I think it shows that no obligation is cast on the Company to undertake the duties of a carrier altogether on every part of their line, but that they may carry some goods on one part of the line and not on others,

and that they may afterwards relinquish the business if they please. The 86th section of 8 & 9 Vic., cap 20, only *enables, not obliges* the Company to be carriers." Baron Anderson concurred. Baron Rolfe also concurred, and said—"The real grievance is not the mode in which the Company manage the railway, but the shutting up of the canal, which the legislature has suffered to be done without adverting to its evil consequences."—*Tried in Court of Exchequer*, 1849.—*Exchequer Reports, vol.* 4, *page* 367.

34. *Oxlade* v. *North Eastern Railway Company.*—Action to require that the Company should carry coal in bulk from their Shincliffe Station, and that as common carriers they were bound to do so, and that a list of tolls exhibited at Shincliffe Station was evidence of such duty. The action was first tried before Baron Martin at York, when the Jury found a verdict for Plaintiff, 1s. damages. The Company appealed to the Court of Common Bench, when Chief Justice Erle said—"The Company say they have not accommodation at the station to enable them to carry on a coal traffic, and although they may have carried samples of coal from it, that is no evidence of their having held themselves out as common carriers of coal in bulk from Shincliffe. The Company have the right to fix the time at which they will run from any particular station, and also what goods they will carry from it. They may say, 'We will carry cattle from one station and not from another, and minerals in the same way.' The Act says that a list of tolls must be put up at every station, but I do not see that that is a proof of their being bound to carry goods from every one of them." Justice Williams concurred. Judgment for Company.—*Tried in Court of Common Bench, January* 18, 1861.—*From Law Times, vol.* 3, *page* 671.

COMMON CARRIERS CANNOT REFUSE TO CARRY IN A GENERAL SENSE.

	Case No.		Case No.
Jackson v. *Rogers* (1683)	36	*Pickford* v. *Grand Junction* (1842)	375
Coggs v. *Bernard* (1703)	35	*Munster* v. *South Eastern* (1858)	449
Harris v. *Packwood* (1810)... ...	41		

DIGEST.

In *Jackson* v. *Rogers* (1683), the Defendant refused to carry goods for the Plaintiff, he being a common carrier. Chief Justice Jefferies said—"That the action was maintainable as well as it is against an innkeeper for refusing guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same." It was alleged and proved that the carrier had convenience to carry the pack.

In *Pickford* v. *Grand Junction* (1842) Baron Parke said—"By virtue of 3 Geo. IV., cap. 34, sec. 156, and 4 Will. IV., cap. 55, sec. 19, the Company, in their character of common carriers, are bound to carry for *reasonable* charges, if reasonable charges are tendered to them."

In *Munster* v. *South Eastern* (1858) Chief Justice Cockburn said—"The Act of Parliament renders it imperative on the Company to carry a certain weight of passengers' luggage. The Plaintiff calls upon them to label his parcels. This they refuse to do. It is impossible not to see that the question was whether the Company, by so refusing to label, could divest themselves of the common law which liability attached to them as carriers." There was nothing to relieve the Company of being common carriers.

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35. *Coggs* v. *Bernard.*—In this case Chief Justice Mold held—"If a carrier is to have a reward (for his services) he is bound to answer for the goods *at all events.* This is the case of the common carrier, common hoyman (bargeman), master of a ship, which case of master of a ship was first adjudged 26 *Car.* 2 in the case *Mors* v. *Slew, Raym.* 220, 1 *Vent.* 190, 238. The law

charges this person thus entrusted to carry goods against *all events* but acts of God and of the enemies of the King. For though the force be never so great as of an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons that they may be safe in their ways of dealing, for else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered, and this is the reason the law is founded upon in that point." *Tried in Court of King's Bench, Trinity Term*, 1703.—*From Lord Raymond's Reports, vol.* 2, *page* 909.

COMMON CARRIERS CAN REFUSE TO CARRY WHEN THEY HAVE NO CONVENIENCE.

	Case No.		Case No.
Jackson v. *Rogers* (1683)	36	*Johnson* v. *Midland* (1849) ...	33
Riley v. *Horne* (1828)...	64	*M'Manus* v. *L. & Y.* (1859) ...	739

DIGEST.

In *Jackson* v. *Rogers* (1683) it was proved the carrier had convenience to carry the pack, and he was defeated in the action.

In *Riley* v. *Horne* (1828) Chief Justice Best said—"We have established these points, that a carrier is an insurer of the goods which he carries, that he is obliged for a reasonable reward to carry the goods to the place to which he professes to carry goods that are offered to him *if his carriage will hold them*," &c.

In *Johnson* v. *Midland* (1849) Baron Parke held—"That it did not appear in evidence that the Company had ever made a public profession to carry coal from Melton Mowbray to Oakham, and it is found they have no convenience for so carrying."

In *M'Manus* v. *Lancashire and Yorkshire* (1859)

Justice Erle said—"The carrier's duty to receive is always limited to his convenience to carry."

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36. *Jackson* v. *Rogers.*—Action on the case for that whereas the defendant is a common carrier from London to Lymington *et abinde retrorsum*, and setting it forth as the custom of England that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them though offered his hire. Held by Chief Justice Jefferies that the action is maintainable as well as it is against an innkeeper for refusing guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same. It was alleged and proved that the carrier had convenience to carry the pack.—*Tried in Court of King's Bench, Michaelmas Term, the 55 of Charles II.*, 1683.—*From Shower's Reports, vol.* 2, 332.

COMMON CARRIERS CAN REFUSE TO CARRY UNLESS THE CARRIAGE IS PREPAID.

	Case No.		Case No.
Batson v. *Donovan* (1820)... ...	50	*Wyld* v. *Pickford* (1841)	82
Pickford v. *Grand Junc.* (1841)	37	*Hunt v. Great Northern* (1851)...	754

DIGEST.

In *Batson* v. *Donovan* (1820) Justice Best said—"The carrier is entitled to have his reward paid to him before he takes the package into his custody."

In *Wyld* v. *Pickford* (1841) it was held "A carrier is bound to convey goods only on payment of the full price (which depends upon their value) for the carriage, and if not paid it is competent to him to limit his liability by special contract."

In *Pickford* v. *Grand Junction* (1841) Baron Parke held that a legal tender was not necessary. "The acts to be done by both parties, namely, the receipt of the

goods and the payment of a reasonable sum for their carriage being contemporaneous acts."

In *Hunt* v. *Great Northern* (1851) it was held that the company were unable to require pre-payment of charge for working back owners' empty coal wagons.

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37. *Pickford* v. *Grand Junction Railway Company.*—Action in respect to refusal to accept a hamper containing maps, value of £200, and carry same, Birmingham to Manchester. The Plaintiffs (Pickford & Co.) brought the matter to trial, when the plea raised was that the declaration did not aver a tender to the Defendants (Grand Junction Railway Company) of the money which they were entitled to receive for the carriage. Baron Parke in giving Judgment said—"The Court think that this is not like the case of a strictly legal tender, a term which is only applicable where an absolute duty, such as the payment of an antecedent debt is imposed on the party making it, in which case the tender stands in the place of a payment, and is in fact a payment so far as it is in the power of the party tendering to make it one, but which remains incomplete only because the party to whom the money is offered refuses to accept it. Such a tender we consider to be altogether unnecessary in the present case, the acts to be done by both parties, namely, the receipt of the goods and the payment of a reasonable sum for their carriage, being contemporaneous acts; the carrier being bound to receive the goods on the money being paid or tendered, and the bailor to pay the reasonable amount demanded on the carriers taking charge of the goods. Whenever a duty is cast upon a party in consequence of a contemporaneous act of payment to be done by another, it is sufficient if the latter pay or be ready to pay the money when the other is ready to undertake the duty. Here the acts to be done by the Plaintiffs and Defendants are altogether contemporaneous. The money is not required to be paid down until the carrier receives the goods, which he is bound to carry. Baron Alderson concurred. Verdict for Pickford & Co.—*Tried in the Court of Exchequer, Easter Vacation*, 1841.—*Meeson and Welsby's Reports, vol* 8, *page* 372; *also Law Journal Reports, vol.* 10, *page* 342.

COMMON CARRIERS CAN RELINQUISH CARRYING TO CERTAIN POINTS OR CARRYING CERTAIN GOODS.

	Case No.
Johnson v. *Midland* (1849)	33

DIGEST.

In *Johnson* v. *Midland* (1849) Baron Parke held—the Company after carrying between certain points "May afterwards relinquish the business if they please."

A RAILWAY COMPANY CAN REFUSE TO CARRY COAL IN TRUCK LOADS, IF THE MERCHANTS WILL NOT PAY DEMURRAGE ON DETAINING THE TRUCKS.

	Case No.
Oxlade v. *North Eastern* (1857)	272

DIGEST.

In *Oxlade* v. *North Eastern* (1857) the Court refused to require the Company to provide trucks for the carriage of coal and coke for a merchant who refused to pay demurrage therefor at the same rate as was charged to all other merchants under similar circumstances.

EXCEPTIONAL CASES WHERE COMMON CARRIERS MAY OR MAY NOT REFUSE TO CARRY GOODS.

	Case No.		Case No.
Morse v. *Slue* (1670)	181	*Northfield Iron Company* v. *Midland* (1866)	348
Garton v. *Bristol and Exeter* (1861)	321		
Oxlade v. *North Eastern* (1864) ...	279		

DIGEST.

In *Morse* v. *Slue* (1670) a box described as containing silk and other mean goods, but which really contained a large sum of money, was delivered to a carrier, and he was robbed on the road. The Judge said—"If the carrier had told the owner that it was a

dangerous time, and if there was money in it he durst not take charge of it, and if the owner had answered as before, this matter would have excused the carrier."

In *Garton* v. *Bristol and Exeter* (1861) the Company refused to accept the Plaintiff's (a carrier's) consignment notes, and insisted upon filling up by their servants their usual printed form of consignment note, with the conditions of carriage attached, and required Plaintiff to sign same. It appeared one of the printed conditions on the notes had been held bad in law (see *Simons* v. *Great Western*), being "unjust and unreasonable." Chief Justice Cockburn, holding this condition bad, held that Plaintiff could not be required to sign a note with such condition.

In *Oxlade* v. *North Eastern* (1864) the Company declined to carry coal for individuals, and confined the carriage to colliery owners. Chief Justice Erle said—"I think the Company have a perfect right to say that they will carry coal only for colliery owners. For the reasons alleged by them in their affidavits it is evident that they could not have the same control over the traffic if they carried coal for the general public."

COMMON CARRIERS CAN REFUSE TO CARRY WHEN THEY CANNOT CARRY THE PARTICULAR GOODS WITH SECURITY.

	Case No.
Batson v. *Donovan* (1820)	50

DIGEST.

In *Batson* v. *Donovan* (1820) Justice Holroyd held that if the carrier had not a sufficiently secure conveyance for the goods (bank notes) he might lawfully have refused to take them.

COMMON CARRIERS CAN REFUSE TO CARRY PASSENGERS IF THEY DO NOT ORDINARILY CARRY PASSENGERS, AND CAN REFUSE TO CARRY TRAFFIC OF A PARTICULAR CLASS IF THEY DO NOT ORDINARILY CARRY IT, NOR PROFESS TO CARRY SAME.

	Case No.		Case No.
Johnson v. *Midland* (1849) ...	33	*M'Manus* v. *L. & Y.* (1859) ...	739

DIGEST.

In *Johnson* v. *Midland* (1849) Baron Parke held—"A carrier may profess to carry a particular description of goods, say cattle or dry goods, in which case he could not be compelled to carry any other kind of goods, or he may limit his obligation to carry between certain points and not intermediate."

In *M'Manus* v. *Lancashire and Yorkshire* (1859) Justice Erle said—"The carrier may choose the kind of conveyance, the times of transit, the mode of delivery, the articles that he will profess to carry, what price he will have, when he shall be paid, and the duty to receive is always limited by his convenience to carry."

COMMON CARRIERS CAN REFUSE TO CARRY IF THE GOODS ARE TENDERED AT AN UNREASONABLE TIME.

	Case No.		Case No.
Lane v. *Cotton* (1701)...	—	*Garton* v. *B. and E.* (1859) ...	385
Pickford v. *Grand J.* (1844) ...	38		

DIGEST.

In *Lane* v. *Cotton* (1701) which, however, is not a carrier's case, Chief Justice Holt held—"So a common carrier may refuse to admit goods into his warehouse before he is ready to take his journey, but yet he cannot refuse to do the duty incumbent upon him by virtue of his public employment."—*Lord Raymond's Reports, vol.* 1, *page* 652.

In *Pickford* v. *Grand Junction* (1844), although the

Company's printed notice said goods delivered after 4 p.m. would not be forwarded same night, the weigher accepted them as being in time, and the Company's defence failed.

In *Garton* v. *Bristol and Exeter* (1859) Justice Williams held—"There is no reason why the Railway Company may not prescribe a certain hour, after which they will not receive goods to go by the next train. If admitted after prescribed time to forward, an extra charge might be made."

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38. *Pickford* v. *Grand Junction Railway Company.*—Claim for deterioration of two consignments of pork delayed in transit, Liverpool to London. The pork was delivered between 5 and 6 p.m. at Wapping Station, and the weigher, Roger Williams, on each occasion said the crates were in time to go on, but notwithstanding they were not sent on the same evenings as delivered. The Company relied upon a printed notice, hung over the doors at the Wapping Station, that "all goods received after 4 p.m. would be forwarded on the next working day." The case was first tried at the London Hillary Sittings before Lord Abinger, when the Judge left the case to the Jury, who gave a verdict for the Company.

An appeal was taken, when a rule was at once given for a new trial. (It would seem the acceptance of the crates by the Company's servant as being in time superseded the notice.)—*Tried in Court of Exchequer, April* 27, 1844.—*From Meeson and Welsby's Reports, vol.* 12, *page* 766.

COMMON CARRIERS CAN REFUSE TO CARRY GOODS BADLY PACKED AND UNFIT TO STAND THE JOURNEY.

(*See also under Damages.*)

	Case No.		Case No.
Munster v. *South Eastern* (1858)	449	*Cox* v. *London and North Western* (1862)...	40
Higginbottom v. *Gt. N.* (1861)	39		

DIGEST.

In *Munster* v. *South Eastern* (1858), Justice Williams said—"There may, no doubt, be cases where articles

of this description (bales of rugs and shawls) may be so carelessly and improperly packed as reasonably to justify a refusal on the part of the Company to accept them. But it does not follow that they would be justified in rejecting every package which may be imperfectly packed."

In *Higginbottom* v. *Great Northern* (1861) the Company received packages of paper in a loose state, and were held liable for partial loss.

In *Cox* v. *London and North Western* (1862) Justice Mellor put it to the Jury if it were not negligence of the Company to receive the casks of oil in their then leaky state, and the verdict condemned it.

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39. *Higginbottom* v. *Great Northern Railway Company.*—Action for £70 for damage to a number of packages of paper, London to Manchester. The receipt of the paper by the Company was proved by a signature of a railway porter in a book, and it appeared that if goods so received were not in good condition it was usual to make a mark or note against the entry in the book, and there was no such mark or note in the present case. It was, however, admitted by the carrier who took the goods to the station that the porter who received them said they were not in good condition, and were a "loose lot." Justice Compton left to the Jury—(1) Was there any damage to the goods while they were in the Company's hands as carriers? (2) Was such damage owing *partially* to the state in which the goods were delivered to the Company? The Jury replied "Yes" to both questions. The Judge then directed the jury to find for Plaintiff for *such* damages as they thought had been caused by the want of care on the part of the Company's servants. Verdict, £40 against Company.—*Tried at Liverpool Summer Assizes*, 1861.—*From Foster and Finlason's Reports, vol.* 2, *page* 796. (The Company appealed to the Court of Exchequer, but failed.)

40. *Cox* v. *London and North Western Railway Company.*—Action for £55 4s. 9d. for leakage of 240 gals. olive oil from 15 casks, London to Liverpool. It was alleged the

casks were old, and the evidence of the condition of the casks was very conflicting. The case was tried at the Liverpool Spring Assizes, 1862, before Justice Mellor. He left to the Jury—(1) Did the damage occur while in the Company's possession from any inherent defects in the casks themselves? (2) If there were defects in the casks, had the Company knowledge or reasonable means of knowledge of such defects, and did the damage arise from such defects? (3) If the Company had not notice of any defects in the casks at the time of loading (cartage), but had such notice when they arrived at the goods station, were they guilty of negligence, in fact, in forwarding them in their then state? The Jury found for full amount against the Company, expressing their opinion that the damage did not arise from any inherent defect in the casks when delivered to the Company's servants, and further expressing their opinion that the Company should not have forwarded the casks from their London Station in the condition they were found to be when there. Judgment against Company.—*Tried at Liverpool Summer Assizes*, 1862.—*From Foster & Finlason's Reports, vol.* 3, *page* 77.

COMMON CARRIERS CAN REFUSE TO CARRY IF TRADER REFUSES TO PAY A REASONABLE CHARGE, BUT THE CARRIER CANNOT MAINTAIN THE REFUSAL IF THE CHARGE SHOULD BE HELD TO BE UNREASONABLE.

	Case No.		Case No.
Harris v. *Packwood* (1810)... ...	41	*Pickford* v. *Grand Junction* (1844)	38
Wyld v. *Pickford* (1841)	82		

DIGEST.

In *Harris* v. *Packwood* (1810) Judge Lawrence held—"There is nothing unreasonable in a carrier requiring a greater sum when he carries goods of a greater value. A carrier is liable by law to carry everything that is brought to him for a reasonable sum, and not to extort what he will."

In *Wyld* v. *Pickford* (1841) it was held "A carrier

is bound to convey goods only on payment of the full price for the carriage, which depends upon their value.

In *Pickford* v. *Grand Junction* (1844) Baron Parke held that by virtue of 3 Geo. IV., cap. 34, sec. 156, and Will. IV., cap. 55, sec. 19, the Company in their character of common carriers are bound to carry for *reasonable* charges if reasonable charges are tendered to them.

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41. *Harris* v. *Packwood*.—Action for £126, value of 66 lbs. of silk lost, in 1810, between London and Coventry, during transit by carrier's waggon. The carrier had given his customers notice that he would not be responsible for packages over £20 in value, unless declared and insurance paid, but he quoted a rate of 9s. 4d. per cwt. for silk between London and Coventry, while for bulky articles his rate was 6s. per cwt. only. The case was referred, on appeal, to the Court of Common Pleas, before four Judges, when the Judgment was for the carrier. Justice Lawrence said—"There is nothing unreasonable in a carrier requiring a greater sum when he carries goods of greater value, for he is to be paid not only for his labour in carrying, but for the risk which he runs, which is greater in proportion to the value of the goods. I would not, however, have it understood that carriers are at liberty by law to charge whatever they please; a carrier is liable by law to carry everything which is brought to him for a reasonable sum to be paid for the same carriage, and not to extort what he will."—*Tried in Court of Common Pleas, Nov.* 24, 1810.—*From Taunton's Reports, vol.* 3, *page* 264.

Refusal of Dangerous Goods.

(See under Acceptance of Contract.)

COMMON CARRIERS REFUSING TO CARRY IF SENDER UPON DEMAND, REFUSES TO DESCRIBE THE QUALITY AND VALUE OF THE GOODS.

	Case No.		Case No.
Riley v. *Horne* (1828)...	64	*Robinson* v. *L. and S. W.* (1865)	751
Crouch v. *L. and N. W.* (1854) ...	380		

DIGEST.

In *Riley* v. *Horne* (1828) Chief Justice Best held—"That he (the carrier) is not obliged to take a package, the owner of which will not inform him what are its contents and of what value they are. If he do take charge of them he waives his right to know the contents and value."

In *Crouch* v. *London and North Western* (1854) Chief Justice Jervis held—"The plea is founded on a general proposition that in the case of all goods of whatsoever nature or quality sent to a common carrier, the person delivering them is bound to know and be able to state, if required, their nature and quality. Now, I think if that be so the consequences would be so highly inconvenient that we should require authority to support it."

In *Robinson* v. *London and South Western* (1865) the Plaintiff, on taking a horse to Liss Station, telegraphed from there to a friend that the horse cost £135. The Station Master becoming acquainted with this refused to book the horse unless insurance was paid on the horse to the value of £135. Chief Justice Erle said—"The Company did refuse to carry the mare because, as they say, the sender refused to declare the value to be greater than £50. The knowledge acquired by the Station Master was not a declaration by sender within the statute, and the Judgment must be against the Company."

DECLARATION OF VALUE AND CARRIERS' ACT.

	Case No.		Case No.
Bernstein v. *Baxendale*	44	*Wyld* v. *Pickford*	82
Davey v. *Mason*	83	*Le Conteur* v. *L. & S. W.*... ...	479
Attorney General v. *Harley* ...	42	*Stoessiger* v. *South Eastern* ...	43½
Mathew v. *Nelson*	43	*Woodward* v. *L. & N. W.*... ...	81
Owen v. *Burnett*	69	*Mytton* v. *Midland*	460
Brunt v. *Midland*	45	*Anderson* v. *L. & N. W.*	48
Wood v. *Metropolitan*...	46	*Treadwin* v. *Great Eastern* ...	47
Flowers v. *South Eastern*	46	*Hearn* v. *L. & S. W.*...	79
Hart v. *Baxendale*	90	*Lawson* v. *L. & S. W.*...	49
Butt v. *Great Western*...	51		

CARRIERS' ACT.

1 *Will. IV., cap.* 68, *sec.* 7.—Provided also, and be it further enacted, that where any parcel or package shall have been delivered at any such office and the value and contents declared as aforesaid, the increased rate of charges been paid and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges paid as aforesaid, in addition to the value of such parcel or package.

Articles specified under the Carriers' Act, 1 Will. IV., cap. 68, sec. 1.	Articles held by the Courts to be included or embraced by the Carriers' Act.	Articles claimed to be embraced in the Carriers' Act, and disallowed by legal decisions.	Names of Cases where the same has been decided.
Trinkets and Jewellery ...	Ivory Bracelets. Gilt Rings, Ornamental Shirt Pins, Brooches, Portmonnaies, Tortoise Shell Ornaments, Pearl Ornaments, Ladies' Scent Bottles, Silk Guards (Watch Guards).	German Silver Fusee Boxes... ...	Bernstein *v.* Baxendale.
,, ,, ...	Gold Chain used for an Eye-glass	... ...	Davey *v.* Mason.
,, ...	Definition of "Trinkets."—A Diamond Necklace held not to be a "Trinket."	... ...	Attorney General *v.* Harley.
Furs	... ...	Hat Bodies made partly of Fur from backs of Rabbits.	Mathew *v.* Nelson.
Glass	Glass converted into Mirrors ...	... ...	Owen *v.* Burnett.
Silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials.	Elastic Silk Webbing—each yard containing 1 oz. silk, value 1s.; 1½ oz. india-rubber, value 7½d.; cotton, value 3½d.	... ...	Brunt *v.* Midland.
,, ,,	... ...	Silk Dress (made up)	Davy *v.* Mason (1841).
,, ,,	Silk Dress, made up	... ...	Wood *v.* Metropolitan (1867).
,, ..	,, ,, ...	... ...	Flowers *v.* South East'n (1867).

Articles specified under the Carriers' Act, 1 Will. IV., cap. 68, sec. 1.	Articles held by the Courts to be included or embraced by the Carriers' Act.	Articles claimed to be embraced in the Carriers' Act, and disallowed by legal decisions.	Names of Cases where the same has been decided.
Silks—*continued*	Silk Hose	... ...	Hart *v.* Baxendale.
,, ,,	Truss of Silk (Raw Silk)	... ...	Butt *v.* Great Western.
,, ,,	Silk Hose	... ...	Bernstein *v.* Baxendale (per Justice Willes).
Maps	Maps	... ...	Wyld *v.* Pickford.
Watches, Clocks, or Time-pieces	Ship's Chronometer	... ...	Le Conteur *v.* London and South Western.
Orders, Notes, or Securities for payment of Money. English or Foreign.	... ...	Bill of Exchange, no Drawer's Name on it and not a Negociable Security.	Stoessiger *v.* South Eastern.
Paintings	... ...	Painted Designs for Carpets and Rugs.	Woodward *v.* London and North Western.
Engravings	Artist's Sketches	... ...	Mytton *v.* Midland.
Pictures	Frame of Painting held to be part of Picture.	... ...	Anderson *v.* London and North Western.
,, ...	... ...	Gilt Frame enclosing a "Lace Corporal," of over £10 value, sent in said Frame to be shown at an Art Exhibition.	Treadwin *v.* Great Eastern.

Articles specified under the Carriers' Act, 1 Will. IV., cap. 68, sec. 1.	Articles held by the Courts to be included or embraced by the Carriers' Act.	Articles claimed to be embraced in the Carriors' Act and disallowed by legal decisions.	Names of Cases where the same has been decided.
Title Deeds	If a loss arises from a delay and not an entire loss, the Carriers Act does not protect the Carrier.—New Title Deeds and Leases were substituted.	... ...	Hearn *v.* London and South Western.
Writings	Author's Manuscripts	... ...	Lawson *v.* London and South Western.
Gold and Silver Coin of this Realm or any Foreign State.			
Precions Stones			
Clocks or Timepieces of any description.			
Stamps			
Bills, Notes of the Governor and Company of the Banks of England, Scotland, or Ireland.			
Bills, Notes of any other Bank in Great Britain or Ireland			
Gold or Silver in a manufactured or unmanufactured state.			
Gold or Silver Plate or Plated Articles.			
China			
Lace	... ...	Machine-made Lace	28 and 29 Vic., cap. 94, sec. 1, of 1865.

28 & 29 *Vic., cap.* 94, *sec.* 1 (1865).—In the Carriers' Act (that is to say, the Act of the Session held in the eleventh year of the reign of King George the Fourth and the first year of the reign of William the Fourth, chapter sixty-eight, "for the more effectual protection of mail contractors, stage coach proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody the value and contents of which shall not be declared to them by the owners thereof") the term "lace" shall with respect to any parcel or package delivered after the commencement of this Act be construed not to including machine-made lace.

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42. *Attorney-General* v. *Harley.*—In this case, tried in the Court of Chancery in 1828, the Lord Chancellor, in speaking of trinkets where there was a dispute in regard to the distribution of jewels under Mrs. Ann Newton's will, said—"There was a valuable diamond necklace and cross, and the principal question is whether under the subsequent gift of 'all my trinkets, necklaces of every description, jewels, garnets, cornelians, and watches,' she intended that particular necklace to pass. She had disposed of all her jewels included in that term, rings set with diamonds, and it is difficult to suppose that she could intend immediately afterwards to give away the diamond necklace and cross under the words 'trinkets and necklaces.' If the diamond necklace were to pass under the term 'necklaces' all jewel trinkets would in like manner pass under the term 'trinkets,' and then there would scarcely remain anything to be sold as included in the bequest of jewels."—*Law Journal Reports, vol.* 7., *page* 31, *Chancery.*

43. *Mathew* v. *Nelson.*—Action for the loss of a quantity of hat bodies, carried by road, and lost between Keynsham (near Bristol) and London. The carrier contended the value was over £10, and that they came under the designation of "furs," as they were made partly of the fur which came from the back of a rabbit. A witness stated hat bodies were made of wool—about half of sheep's and half of rabbit's wool—and that there was not any hair in them at all.

Chief Justice Tindal said—"Look at the words of the statute, and consider whether it does not mean articles made entirely of fur, and not articles in which there is only a portion of fur. The statute speaks of *silks* in a manufactured and unmanufactured state, and whether wrought up or not wrought

up with other materials, but it mentions "furs" without any such provision." The Jury was of opinion that the hat bodies were made of wool. Judgment against carrier.—*Tried at Nisi Prius, June* 27, 1833.—*From Carrington and Payne's Reports, vol.* 6, *page* 58.

43½. *Stoessiger* v. *South Eastern Railway Company.*—Action for £9 10s. cash, sent in a value parcel and never delivered, Chatham to Birmingham. In the parcel was an imperfect bill of exchange for £11 10s., accepted by a Mr. Cruttenden, but with no drawer's name on it, and hence not negotiable. The Company contended it was under the Carriers' Act "Securities for the Payment of Money" or "Writings," and brought the value of the parcel above £10, and same not having been declared they were not liable for the £9 10s. or the bill. The Court decided the Bill being imperfect was not a security. Verdict against Company.—*Tried in Court of Queen's Bench, April* 21, 1854.—*From Law Journal Reports, vol.* 23, *page* 293.

44. *Bernstein* v. *Baxendale.*—Action for £229 1s. 6d. for a variety of fancy goods lost in transit, London to Portsmouth. The Defendants pleaded the Carriers' Act, 11 Geo. IV., and 1 Will. IV. cap. 68, as reason why they should not pay for a portion of the goods for which no declaration of value had been made. For the other portion of the goods they paid £106 17s. into court. The case was first tried at the London Sittings, before Judge Byles, and a verdict was given by the Jury for £122 4s. The Judge gave liberty to move to set aside or reduce the damages if it were held the articles came within the Carriers' Act. On the appeal case Chief Justice Cockburn held that ivory bracelets, ornamental shirt pins, gilt rings, brooches, tortoise-shell and pearl ornamental portmonnaies and ladies scent bottles are trinkets within the Carriers' Act. "Silk Guards" were also held to come within the meaning of the same Act, as the wording is "Silks in a manufactured or unmanufactured state, and whether wrought or not wrought up with other materials." German silver fusee boxes were held not to be trinkets, and Plaintiffs were held liable for their value. Portmonnaies were held to be pretty things to be carried about and for show, although money

may also be put into them. The court was disposed to hold that whatever comes within the description that its primary object is ornament it is then a trinket, although the article may incidentally be applied to some useful purpose. In *Mathew* v. *Nelson* (6 *Car.* and *P.*, 58) it was held as to "furs" that hat-bodies, which were made partly of the fur from the back of rabbits, do *not* come within the description of furs in the Carriers' Act. In *Owen* v. *Burnett* (3 *Law J. R.*, 76 Ex.) glass converted into a mirror was held to be "glass" within the Act. Justice Willes said—"I know that in *Hart* v. *Baxendale* (20, *Law J.*, 338 Ex.), although this does not appear in the report, the Court of Exchequer intimated that silk hose was within the statute, and that the ruling of Lord Abinger in *Davey* v. *Mason* (1 *Car.*, and *M.* 45) that silk dresses made up to wear were not within the statute could not be sustained. In the same case Lord Abinger ruled that a gold chain used for an eye-glass was not to be considered as a trinket. Chief Justice Cockburn said—"As at present advised I do not think that the article ceases to be a trinket, because some utility is added to its ornamental value. The court reduced the verdict to £11 17s.—*Tried in Court of Common Pleas, April* 16, 1859.—*From Law Journal Reports, vol.* 28, *page* 265.

45. *Brunt* v. *Midland Railway Company.*—Claim for £140 12s. 8d. for a hamper of elastic silk webbing, damaged by wet and rendered useless during carriage to Manchester. The Company contended the goods came under the Carrier's Act as "silk wrought up with other materials into a manufactured state." There are three kinds of elastic webbing—(1) silk web, (2) plaited web, (3) cotton web. A yard of this silk web weighed about three ounces and contained one ounce of silk, 1s., one and a quarter ounce of India rubber, 7½d., and three-quarters of an ounce of cotton, 3¼d. The Company paid £5 into Court. The case was first tried by Chief Justice Cockburn, at the Derbyshire Summer Assizes, 1863, and it was agreed for a verdict to be given for £15 over the £5 paid into Court, and reserve the question as to the goods coming within the Carriers' Act to the Court above. On the appeal case Chief Baron Pollock, with Barons Martin, Channell, and

Pigott, held that this webbing was within the definition in the Act of "silks wrought with other materials." Judgment for Company.—*Tried in Court of Exchequer, January* 15, 1864. —*Law Journal Reports, vol.* 33, *page* 187.

46. *Flowers* v. *South Eastern Railway Company.*—Action for £11 18s. 0d., being £10 for a silk dress and 38s. for Plaintiffs' clothes enclosed in a portmanteau, which constituted the passenger's luggage of his wife travelling alone from Redhill to Charing Cross. The 38s. also included some flowers in a hamper carried at the same time. Both portmanteau and hamper were lost. The Company paid a sum into Court covering the loss of the other contents of portmanteau. The case was first tried at Guildhall before Baron Bramwell, when the verdict was in favour of the Company. Plaintiff appealed, when Baron Pigott said—"I think we are bound by report given by counsel of the case of *Wood* v. *Metropolitan Railway Company* (decided in Queen's Bench at Sittings in Banco after last Hilary Term, but not reported), and I think that if this question had been open I should have come to the same conclusion as the Court of Queen's Bench in that case. There is nothing in the Carriers' Act to show that the words there used were not used in their most comprehensive meaning or to show that they were intended to be confined to articles of merchandise. Our Judgment as to the silk dress will therefore be for the Company. With respect to the other question I agree with my learned brothers that the plea was not proved. Judgment for £1 18s. 0d." Barons Bramwell and Channell concurred.—*Tried in Court of Exchequer, May* 4, 1867.— *Law Times Reports, vol.* 16, *page* 329.

47. *Treadwin* v. *Great Eastern Railway.*—Action for 28s. for a gilt frame and 7s. 6d. for a packing case. Plaintiff sent from Exeter to Norwich for a Church Congress, on exhibition, an Honiton Lace "Corporal," in value over £10, but did not declare it. The lace was enclosed in a frame, and the frame glazed for exhibition on a wall. The case was first tried before Justice Byles at Guildhall, when a verdict was given for 35s. 6d., the value of frame and case. The Company appealed, when Chief Justice Bovill said—"A frame might

probably be held to be part of a picture, but here the frame is attached only for the purpose of exhibition, it is not an accessory for the purpose of the conveyance of the lace, neither is the case." Justice Byles concurred. Justice Willes dissented, and did not think the frame a separate article. Two Judges being in favour of Plaintiff, Judgment was against the Company.—*Tried in Court of Common Pleas, Jan.* 25, 1868. *Law Times Reports, vol.* 17, *page* 601, *also Law Journal Reports, vol.* 37, *page* 83.

48. *Anderson* v. *London and North Western Railway Company.*—Action for £25 for frames to certain pictures, the Company having lost both pictures and frames. The Company pleaded that they were not liable under the Carrier's Act as the pictures being of over £10 value had not been so declared. The Plaintiff contended that the frames to the pictures were to be regarded as distinct articles from the pictures, and that he was entitled to recover their value. The Jury assessed the value of the frames at £25. The Judge reserved leave to move for a non-suit.—*Tried at the Liverpool Passage Court.* On the appeal Baron Martin said—"The point at issue is a question of fact. The question is what would mankind understand to be a picture? It generally consists of (1) the canvas, (2) the painting itself, (3) the frame. These three things must be considered, not separately, but as an entire thing. I say the Plaintiff cannot recover, it being the common understanding of mankind that a picture means not only the canvas and the painting, but also the frame, if it be enclosed in one. Chief Baron Kelly said—"A picture is in general encompassed with or set in a frame. But even if that were not so the frame of the picture and the picture itself must be considered one article for the purpose of merchandise. I am of opinion the Company is exempt from liability."—Baron Pigott concurred.—*Tried in Court of Exchequer, Hilary Term,* 1870.—*Law Journal, vol.* 39, 55, *Exchequer.*

49. *Lawson* v. *London and South Western Railway Company.* Action in respect to an author's MS. lost, which was held to be a writing within the Carriers' Act. The Judge said—"In this case, the Plaintiff, an author, claimed from the

Defendants £10 as damages for the loss of a packet containing a manuscript intrusted to them as common carriers. On the 1st March the Plaintiff delivered the packet in question to the booking clerk of the department at Malden Station, and took a receipt for the same in the following words: 'Received of J. A. Lawson, a packet of manuscript for transmission to Messrs. Hurst and Blackett, 13, Great Marlborough Street, London.' signed with the clerk's initials, and the plaintiff paid the sum of 6d. for carriage. On the next day, the packet was delivered at the publishers and 6d. demanded and paid for carriage, but, on opening the packet, it appeared that it had been previously opened, some cardboard introduced, and the MS. abstracted. The Plaintiff deposed that he was the author of several works, for which he had received considerable remuneration, and that Messrs. Hurst and Blackett had offered to receive the MS. in question on approval; that in the event of their accepting it, he had intended to ask £300 for it, and that he would not have taken less than £150 for it, but that he claimed only £10, because he conceived that he was disabled by the Carriers' Act from claiming any larger sum. Mr. Alfred Blackett, of the firm of Hurst and Blackett, confirmed the Plaintiff's evidence, and proved the receipt of the packet and loss of the MS., as also the payment of 6d. for carriage; and he further deposed, 'That any work written by a man who had his previous works published like the Plaintiff, would certainly be worth more than £10.' On the part of the Defendants, it was contended that the manuscript had no appreciable value except as waste paper, and that the Plaintiff could only be entitled to nominal damages, and that if the MS. was in fact worth more than £10 as deposed by the Plaintiff and Mr. Blackett, that it was a 'writing' within the first section of the Carriers' Act, and that the value not having been declared by the person sending the same the Defendants were not liable. I am of opinion that the manuscript of an author, like the painting of an artist, is capable of being appreciated where there is sufficient evidence of its merits according to the opinion of competent witnesses, and although in the present case there has been no very satisfactory evidence of the nature of the MS. in question, still I think that there is sufficient evidence that it was of greater

value than £10, and, therefore, that under the Carriers' Act the Plaintiff can recover no damages for the loss of the same. There will, therefore, be a verdict for the Defendants, without costs."—*Tried in the Southwark County Court, June* 8, 1882. *From Law Times, June* 24, 1882.

IF GOODS ARE LOST (WHEN UNDECLARED), AND FELONY OF CARRIER'S SERVANTS IS ALLEGED, IT MUST BE PROVED TO ENABLE THE OWNER TO RECOVER.

	Case No.		Case No.
Batson v. *Donovan* (1820) ...	50	*Kirkstall B. Co.* v. *Furness* (1874)	55
Butt v. *Great Western* (1851) ...	51	*Molyneaux* v. *I. N. W.* (1875) ...	57
Great Western v. *Rimell* (1857) ...	52	*M'Queen* v. *Great Western* (1875)	58
Metcalf v. *L. B. & S. C.* (1858) ...	53	*Turner* v. *Great Western* (1876) ...	59
Vaughan v. *L. & N. W.* (1874) ...	54	*Way* v. *Great Eastern* (1876) ...	60
Gogarty v. *G. S. & W.* (1874) ...	56		

DIGEST.

In *Batson* v. *Donovan* (1820) a small box of money (£4,072) was stolen, Berwick to Newcastle. On arrival of coach at Berwick, the box was put into the boot at 12 a.m.; the coach stood in the middle of the street (80 yards wide) half an hour, without horses, but watched by a porter. It was supposed that during this time it was stolen. No declaration had been made. The Company were held not liable, and Justice Bayley said—"A carrier is to a certain extent an insurer, and concealment of it (the value) varies the risk and discharges the underwriter."

In *Butt* v. *Great Western* (1851) a truss of silk, value £300, one of eight, was lost, Westbury to London. Judge Cresswell said—"The statute takes away the Company's liability as to gross carelessness, but has reserved it as to felony, but it does not make the remedy in case of felony larger than at common law. If, therefore, it was necessary at common law to prove gross negligence as well as felony, it must still be so." Judgment for Company.

In *Great Western* v. *Rimell* (1857) a box of watches was believed to have been stolen. Chief Justice Jervis condemned the County Court Judge for leaving the question to the Jury—"It is the duty of the Judge to withdraw the question altogether from the Jury where there is no evidence to prevent them, if I may say so, from misconducting themselves by finding against the Company, which they are always ready to do." Justice Cresswell said—"A mere suspicion that the loss has arisen by felony is not sufficient; it must be proved that it actually did so arise."

In *Metcalf* v. *London Brighton and South Coast* (1858) there was evidence that a felony had been committed by some one. Chief Justice Cockburn said—"It is on the Plaintiff who proposes to get rid of the effect of the statute, by showing that he comes within the excepted case, not merely to show the possibility of such an event (theft) but the actual fact of a felony."

In *Vaughan* v. *London and North Western* (1874) a box of jewellery had been stolen. Part of the jewellery was found on a siding at the Lime Street Station, Liverpool, one hundred yards from the parcels delivery office. Baron Pigott on appeal, held that there was evidence more consistent with the felonious acts of the Company's servants than with their innocence. Judgment against Company.

In *Kirkstall Brewery Company* v. *Furness* (1874) a parcel of money (£35) was lost. It was proved the guard handed the parcel to parcels porter, John Haslam, and John Haslam absconded afterwards, leaving a fortnight's wages due to him, and it was said he had gone to America. The Company were held liable.

In *Gogarty* v. *Great Southern and Western* (1874), tried in Ireland, the Judgment appears to have differed from the English cases. It was left to the Jury, who of course found the Company's servants had stolen the box, valued at £210. The yellow tin box was passenger's luggage, and was last seen at

Portarlington Junction where there was a change of train. On the appeal case Chief Justice Monaghan said—"The possibility of its having been taken by anybody, except by the servants of the Company, was never suggested. Under these circumstances we do not think we should be justified in interfering with the verdict for the Plaintiff." It may not be inaptly said in respect to this case that the exception proves the rule. It was tried in June, 1874, just after *Vaughan* v. *London and North Western* in January, 1874, which may be some explanation and excuse.

In *Molyneaux* v. *Irish North Western* (1875) a parcel of jewellery, Enniskillen to Birmingham, was lost; there was no trace after arrival at Stafford. Some railway porters at Stafford had been prosecuted for having in their possession watches and jewellery. Justice Morris, on appeal, at the Assizes, held there was no evidence to show that the parcel had been stolen by the Company's servants.

In *M'Queen* v. *Great Western* (1875) a case of drawings, value £365, had been stolen, as supposed, at Cardiff. It was loaded in a truck for London, and lay in the Cardiff station yard from 12 p.m. to 8 p.m. The yard was in a low neighbourhood of Cardiff, and badly fenced; there were frequent trespassers, and many persons coming and going through it. Chief Justice Cockburn said—"It is merely a question as between the Company's servants and anybody else, and there is nothing whatever to point to the Company's servants, particularly with the exception of the greater facility of access." Judgment for Company.

In *Turner* v. *Great Western* (1876) two pieces of silk had been stolen, London to Guernsey. At Frome Station (during the transit) the cover of the box was found to have been broken off, and the silk gone. It was held that there was no evidence of felony by Company's servants.

In *Way* v. *Great Eastern* (1876) three pictures, value £1,000, had been loaded in a delivery van in

the Company's station. Some unknown man went to the Company's cartage office at the station, said his name was Clarke, employed by the Company's carting agent, and got a delivery-sheet and gate-pass, drove the van out and stole the pictures. Plaintiff contended that giving the man the sheet was treating the thief as the Company's servant, and hence they were liable. Judge Blackburn said—"This was a high and artificial attempt to make out a constructive liability against the Company." Judgment for Company.

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50. *Batson* v. *Donovan*.—Action for a small box containing bank notes and bills of exchange to value of £4,072, stolen, Berwick to Newcastle. Sender knew of the carrier's notice that he would not be responsible for parcels of value unless declared and insurance paid. The contents of box was not declared. The coach arrived at Berwick at 12 a.m., and stood half an hour in the middle of the street, eighty yards wide, without the horses, but watched by a porter. The box was put in the boot of the coach at 12.15 a.m., and was supposed to have been stolen therefrom before the coach left Berwick, and unobserved by the porter. This was in the year 1819, before the passing of the Carriers' Act.

The case was first tried before Justice Bayley, at the Northumberland Summer Assizes, 1819, when the Jury gave a verdict for Defendant, the carrier.

An appeal was made, when Justice Holroyd said—"In this case the carrier had by his notice expressly refused to accept parcels of value without being paid for them accordingly, and it seems to me to have been the duty of the Plaintiff, when he brought the goods to the carrier, to specify their quality or value. In the absence of such notice it would have been the duty of the carrier to make inquiry, if he either wished to have a reward proportionate to their value, or to know whether they were goods of that quality for which he had not a sufficiently secure conveyance, for if he had not he might lawfully have refused to take them." In another place he says—"It has been laid down that, where a carrier has convenience to carry goods, he cannot refuse to take the goods of any parti-

cular person, and possibly an action might lie against him if he refused to take such goods without a sufficient reason for the refusal. The question arises whether there was a misdirection. The Judge left two points to the Jury—(1) whether there was negligence in the Plaintiff not specifying the contents of the box to the carrier; (2) whether there was gross negligence in the Defendants. I think the Jury gave the right answer to both questions." Justice Bayley concurred, and said—"A carrier is to a certain extent an insurer, and concealment of it varies the risk and discharges the underwriter. The value here does increase the risk; if that value is concealed, it is concealed wrongfully, then why is the carrier to be liable? The Plaintiff here concealed, and the carrier had not his due reward; the carrier was deprived of that which, according to this case, is the foundations of the carrier's liability, viz., a reward proportionate to the risk, and by not being apprised of what he received he was not put upon his guard to take what, with reference to this box, would have been proper care." Chief Justice Abbott also concurred.

Justice Brett dissented, but said—"The carrier is entitled to have his reward paid to him before he takes the package into his custody. He always was at liberty to make a special acceptance of the goods, and to introduce into the terms of such acceptance any reasonable condition not inconsistent with his duty to the public." Judgment for carrier.—*Tried in the Court of King's Bench, November*, 1820. *From Barnewall and Alderson's Reports, vol.* 4, *page* 21.

51. *Butt* v. *Great Western Railway Company.*—Action for £300 for loss of a truss of silk, one of eight trusses, Westbury to London. No declaration of value was given to the Company, and it was therefore contended by them that they were not liable. Plaintiff contended they were liable owing to gross carelessness, and also owing to the felonious acts of their servants. Justice Cresswell said—"The statute takes away the Company's liability as to gross carelessness in respect to the excepted articles (when not declared), but has reserved it as to felony; but it does not make the remedy in case of felony larger than at common law. If, therefore, it was neces-

sary at common law to prove gross negligence as well as felony it must still be so. The Judgment of the Court, consisting of Chief Justice Jervis, Justice Maule, Justice Cresswell, was for the Company.—*Tried in Court of Common Pleas, June* 3, 1851.—*From Law Journal Reports, vol.* 20, *page* 241.

52. *Great Western Railway* v. *Rimell.*—Action for £39 9s. for a box of watches missing, Gloucester to London. The box was delivered at 8 p.m. as an ordinary parcel, and the carriage 9d. paid. The Company's porter received the box and signed for it, and swore he put it into the guard's "box" on the train, the customary place for parcels. The parcel was delivered very late, and he had already placed the way-bill with ten parcels on it in the guard's box. He unlocked the guard's box, took out the way-bill, re-locked the box and took the way-bill into the office, and entered this the eleventh parcel. He then replaced the way-bill. Other Company's servants had carriage keys that would open the guard's box besides him, and passengers have keys, as the keys of the boots of dog carts are similar. The guard denied getting more than ten parcels the particular night. The case was tried in the Gloucester County Court, Feb., 1856. The Plaintiff contended the parcel had been stolen, and although the value had not been declared the Company were notwithstanding liable for the felony. The Judge left to the Jury two issues, (1) whether a felony had been committed with the parcel in question by some one of the Company's servants, (2) that such felony was caused or facilitated by the negligence of the Company or other servants. The Jury gave a verdict for Plaintiff for full amount. The Company appealed, when Chief Justice Jervis gave the following Judgment—"I am of opinion that the Judge of the County Court was wrong in two respects, (1) in leaving the question whether a felony had been committed by the Company's servants to the Jury at all, for there was no evidence that a felony had been committed by any one of them. Unless the Judge in cases of this sort takes the matter into his own hands, the statute which was passed for the protection of carriers will become a dead letter, for Juries are always ready to find a verdict against a Railway Company. It is the duty of the Judge to withdraw

the question altogether from the Jury, where there is no evidence to prevent them, if I may say so, from misconducting themselves by finding against the Company, which they are always ready to do. Secondly, I think the Judge has entirely misconceived the judgment of this Court in the case of *Butt* v. *Great Western Railway*, because when the Defendants rely upon the statute for their defence, negligence has nothing to do with the question. The rule is this: under the statute felony by a servant is a sufficient answer to the defence set up by the carrier, and negligence has no effect one way or the other. Where the defence is independent of the statute, negligence alone is a sufficient answer. Under the statute felony is an answer. Under the carrier's notice negligence is an answer. That is the result of the decision in *Butt* v. *Great Western Railway Company*. We only decided that felony by the Defendants' servants, without negligence on their part, was not a good answer to a defence, that the value of the goods was not declared according to the notice."

Justice Cresswell said—"I am of the same opinion. The statute protects the Company, unless the loss has occurred by the felonious act of their servants. The words of the 8th section of the Carriers' Act, 1 Will. IV., cap. 68, are 'that nothing in this Act shall be deemed to protect, &c., from liability to answer for loss arising from the felonious acts, &c.' A mere suspicion that the loss has arisen by felony is not sufficient; it must be proved that it actually did so arise. In this case there is no evidence of any loss arising from the felonious act of any one." Justices Williams and Willes concurred. Verdict for Company.—*Tried in Court of Common Pleas, June* 10, 1857.—*From Law Journal Reports, vol.* 27, *page* 201.

53. *Metcalf* v. *London Brighton and South Coast Railway Company.*—Action for missing jewellery (two watches, a snuff box, a purse, a sovereign, a ring, a pencil case, four shirt studs, a pin, two shirt cuff links) placed in a tin cash box and the tin cash box placed in a case with wearing apparel, Worthing to London. The case was delivered, but the tin cash box had been abstracted. The value was over £10, and was not declared on delivery to the

Company. The case was locked with a padlock, and when delivered to consignee (who was also sender) bore no marks of violence, and the lock was still on, but when the case was opened the cash box and its contents were gone. The Plaintiff pleaded felony by the servants of the Company, which plea, if established, over-rides the Carriers' Act (1 Will. IV., cap. 68), otherwise this Act protects the carrier when the package contains jewellery over £10 in value, and which is not so declared. The case was first tried before Justice Byles at the London Sittings before Easter, 1858, when on the plea of felony Plaintiff obtained a verdict for £30. The Company had leave to move for a new trial. On the trial for a rule Justice Williams said—"Here there was evidence that a felony had been committed by some one, but Plaintiffs are not entitled to recover unless they show that the felony was by one of the Company's servants. If it is left to the Jury upon a scintilla of evidence to say whether there has been a felony, we all know that they would be anxious to find against the Company. Chief Justice Cockburn said—"The statute was intended to protect the carrier against the loss of articles the value of which was disproportionate to their bulk. Then comes the exception on the general rule contained in the 8th section. Surely it is on the Plaintiff, who proposes to get rid of the effect of the statute by showing that he comes within the excepted case, not merely to show the possibility of such an event but the actual fact of a felony. Verdict for Company.—*Tried in Court of Common Pleas, May 24 and 26, 1858.—Law Journal Reports, vol. 27, page 333.*

54. *Vaughan v. London and North Western Railway Company.*—Action for £50, for value of a box of jewellery stolen, Birmingham to Liverpool. The value of the box was over £10, but was not so declared to the Company. The box was addressed to Plaintiff's traveller, Holland, at the Laurence Hotel. On the day delivery should have been made the Company's carter, at 8.30 a.m., called at the Laurence Hotel, and delivered two packages for other consignees. He was about obtaining a signature for three packages from the housekeeper, when the manager interposed, and observed to the carter he had only brought in two packages. On being asked where was Holland's

box he said—"Isn't it there?" Finding it was not, he went to the door to his covered parcel van, but could not find it. Some days after a Liverpool police detective found a ring and a horse-shoe pin, part of the contents of the box, in a Liverpool pawnbroker's shop, which led to the arrest of two men. One man took the detective to a siding on the railway at the Lime Street Station, 100 yards from the Parcel Delivery Office, where a locket and some pieces of wood were found. The men were released. The detective spoke to Wilson, the parcels clerk, who said he had found a pin near the same spot, and another man had found two. Wilson said he did not mention it, as he did not think it had been worth anything. The Company produced no witnesses, but contended there was no evidence that the loss arose from the felonious acts of their servants. The case was first tried at the Warwick Summer Assizes, 1873, before Justice Honeyman, when the Jury found a verdict for Plaintiff. The Company appealed.

On the appeal case Baron Pigott said—"The question is whether there was evidence for the Jury that the loss arose from the felonious acts of servants in the employ of the Company. I take it to be the true construction of 1 William IV., cap. 86, sec. 1, which was put upon it by the Court of Common Pleas in *Metcalfe* v. *London Brighton and South Coast Railway*, for there the question was whether a felony had been committed by some *one*, and I do not understand that any Court has considered that the evidence should point to a particular servant. It is enough if it tends to show that a felony has been committed, and that it is more consistent with the facts that such felony was committed by a servant of the Company than by some other person. The evidence tends to show that the box was stolen from the premises of the Company at the time it was in their possession, or just after it had been transferred from the Parcels Office to Hindley's cart. If that were so who had any opportunity of taking it at that time? It is not shown that the public could have gone into the office and taken it without being seen. Moreover, when we find that the box was broken open on the Company's premises, and that Wilson had some of the articles, does not that throw the onus on the Company's servants of explaining the matter as far as they can? I am of

opinion that there was evidence *more* consistent with the felonious act of the Company's servants than with their innocence." Chief Baron Kelly and Baron Amphlett concurred. Judgment against Company.—*Tried in Court of Exchequer, January* 22 *and* 27, 1874.—*From Law Journal Reports, vol.* 43, *page* 75.

55. *Kirkstall Brewery Company* v. *Furness Railway Company.*—Action for £35 for a parcel of money missing at Ulverston Station, sent per passenger train from Whitehaven. The contents of the parcel were not declared, nor its value, hence the Company contended they were not liable under the Carriers' Act. It appeared the guard handed the parcel to a porter at Ulverston on 17th July, the day it was dispatched. John Haslam, the parcel porter at Ulverston, absconded on the 18th July, leaving a fortnight's wages due to him, and it was said he had gone to America. The Ulverston station-master went to the police superintendent and told him of the loss of the money, of Haslam's absconding, and of his suspicions that Haslam had taken the money. The case was first tried at the Middlesex Sittings, 1873, before Justice Denman, when the Company objected to the police superintendent giving evidence of the conversation with the station-master relative to the supposed felony of Haslam. The Judge, however, admitted the evidence, and the Jury returned a verdict against the Company for the amount claimed. The Company appealed on the ground of improper reception of the police superintendent's evidence. On the appeal case Chief Justice Cockburn said—"I think the Judgment must be against the Company, and that the evidence was, under the circumstances of the case, admissible. I think it impossible to say that a man who has the sole management of a railway station, and had authority to cause a person to be apprehended if he had reasonable and probable cause to suppose that a felony had been committed, could not have authority to give instructions to the police, and could not make such communications as would be admissible in evidence just as if they were made by his principals." Justice Archibald concurred, and said—"If the statement had been made to the police superintendent by an individual carrier, it would be admissible. Then

is it not admissible if made by an agent? That depends upon whether the agent was acting within the scope of his authority. Being in charge of the station at the time a felony was committed, it was his duty to put the police in motion. That being so, I think that he was acting within the scope of his duty, that he had power to bind the Company, and, therefore, that the evidence was admissible." Justice Quain concurred. Judgment against Railway Company.—*Tried in Court of Queen's Bench, May* 27, 1874.—*From Law Journal Reports, vol.* 43, *page* 142.

56. *Gogarty* v. *Great Southern and Western Railway.* —Action for the loss of a yellow tin box, containing jewellery, which was passenger's luggage from Cork to Tullamore. The yellow tin box was seen at Portarlington, where the passengers had to change, but on arrival of the train at Tullamore, the yellow tin box was not forthcoming. The station-master at Portarlington, the guard of the train, and the porters gave evidence that all the luggage in the van labelled for Tullamore was transferred at Portarlington into the Tullamore train, and each of the two porters who had actually removed the luggage from the van deposed that he did not make away with the yellow tin box. The Jury, however, found the box was stolen by the Company's servants, and assessed the value of the jewellery at £150, and that of the other articles at £60.

On the appeal case, it was held, following *Vaughan* v. *London and North Western Railway Company*, that to sustain the Plaintiff's contention it was sufficient to show the probability that the theft was committed by some one in the Defendants' employment rather than by a stranger.

Chief Justice Monaghan said—"The possibility of its having been taken by anybody except by the servants of the Company was never suggested. Under these circumstances, we do not think we would be justified in interfering with the verdict for the Plaintiff, as we consider that the evidence was sufficient. We entertain no doubt there was sufficient evidence to go to the Jury, and in my opinion it greatly preponderates against the case made by the Company." Judgment against the

Company.—*Tried in the Court of Common Pleas, June* 9, 1874. —*From Irish Reports, Common Law, vol.* 8, *page* 344.

57. *Molyneaux* v. *Irish North Western Railway Company.* —Action for £34 10s. for a parcel of jewellery lost, Enniskillen to Birmingham, per passenger train. Plaintiff did not declare contents or value, or pay insurance. Trace of the parcel was lost after its arrival at Stafford. A newspaper report was read of proceedings at Stafford against railway porters who had in their possession several watches and jewellery proved to have been stolen from parcels. Verdict for Plaintiff.—*Tried before Chairman, Quarter Sessions, Enniskillen. Appeal tried before Justice Morris, Spring Assizes, Enniskillen*, 1875, who reversed the verdict of the Court below, stating there was no evidence to show that the parcel had been stolen by the Company's servants.

58. *M'Queen* v. *Great Western Railway Company.*— Action for £365 for a case of drawings lost in transit, and value not declared, Cardiff to London. The case was labelled "valuable pictures," and was delivered at Cardiff on the morning of 30th August, 1873. It was loaded, and the waggon turned out in the yard about 11.0 or 12.0 p.m., and lay in the yard until 8.30 p.m. same day. There was a seaman's chest loaded with the case in the centre of an open truck, and empty packages were loaded round, and a tarpaulin covered the lot. Many persons had access to the yard, and the people of the neighbourhood, a low part of Cardiff, were in the habit of using the yard as a thoroughfare unless the Company's servants stopped them. It was fenced off by a paling which anyone could get over. Parties used the yard for loading and discharging their own waggons. No one was employed by the Company to look after laden trucks which had been so shunted into the yard. At London the case of drawings was not in the waggon, and the cords of the seaman's chest had been cut and it had been opened. If the case had been insured the Company would have received £12 12s., whereas they only received 4s. 1d. carriage. The cause was first tried at Westminster, before Chief Justice Cockburn, who told the Jury if the Plaintiff had made out to their satisfaction, under all the cir-

cumstances, that it was more probable that the case was taken by the Company's servants than by one of the outside public, Plaintiff, according to the law as laid down in *Vaughan* v. *London and North Western Railway Company*, would be entitled to their verdict. The Jury gave a verdict for the Plaintiff. The Company appealed, when Chief Justice Cockburn said—"I am of opinion in this case our Judgment must be to enter a non-suit. It appears to me there was not sufficient evidence to go to the Jury of a felonious taking by the Company's servants. I quite agree with my brother Quain that if we did not interpret the section of the Act with the weight which it ought to carry with it, we should fritter away this Act of Parliament which was intended for the protection of the carrier. It is enough if there is proof to satisfy the Jury that the taking was by some one who was more or less one of the Company's servants, without specifying particularly which of them. I cannot say that a *prima facie* case was here made out that called upon the Company (as in Vaughan's case) for an answer, and if that be so they would be entitled to take their stand on the evidence as it existed. It is merely a question as between the Railway Company's servants and anybody else, and there is nothing whatever to point to the Railway Company's servants particularly, with the exception of the greater facility of access." Judgment for Company. Justices Mellor and Quain concurred.—*Tried in the Court of Queen's Bench, June* 1, 1875. —*From Law Journal Reports, vol.* 44, *page* 130.

59. *Turner* v. *Great Western Railway Company.*—Action for £42 15s., value of two pieces of silk stolen while in the Company's charge. The goods were within the Carriers' Act, and the value was not declared at the time of delivery. The silk was consigned from London to Guernsey. It was loaded for Weymouth, and left Paddington 12.50 a.m., December 23. At Frome Station the cover of the box was found to have been broken off and the silk gone. The train divided at Chippenham, where the Bristol traffic went off, and again at Westbury, where the Salisbury traffic went off. Frome was the first station after leaving Westbury in the direction of Weymouth. The case was first tried at the London Michaelmas

Term After Sittings before Lord Coleridge, when the Judge non-suited the Plaintiff.

Plaintiff then appealed, when Justice Grove held that this case was ruled by the cases *M'Queen* v. *Great Western* and *Campbell* v. *North British*, and that there was no evidence of felony by Company's servants. Judgment for Company, the non-suit being upheld. Justice Archibald and Chief Justice Coleridge concurred.—*Tried in Court of Common Pleas, January* 12, 1876.—*From Law Times Reports, vol.* 34, *page* 22.

60. *Way* v. *Great Eastern Railway Company.*—Action for £1,000 for three pictures, by Vandyke, Poussin, and Wilson, stolen from Brick Lane Station while in the Company's charge. The value of the pictures had not been declared; had it been the carriage would have been £50 2s. 11d., instead of which it was only 2s. 11d. The pictures were sent from Chelmsford, and were for Rochester. They were loaded on a delivery van, 418, to be taken and delivered to the London Chatham and Dover Company. Some unknown man went to the Company's cartage office at the station, said his name was Clarke, employed by the Company's carting agent, and got a delivery sheet and gate-pass, drove the van out, and stole the pictures. The van, empty, was subsequently found in the Company's Whitechapel Coal Yard. Plaintiff contended that the Company, by their acts in giving the man the documents, treated the thief as their servant, and consequently were liable for the felony. Judge Blackburn—"This was a high and artificial attempt to make out a constructive liability against the Company. It was impossible on the facts, or any fair consideration of the Act (1 Will. IV., cap. 68) to hold them liable." Judgment for Company.—*Tried in Court of Queen's Bench, May* 9, 1876.—*From Law Journal Reports, vol.* 45, *page* 874; *also Law Times Reports, vol.* 35, *page* 253.

Where no Declaration is made of the Value being over £10, or in the old Carriers' time over £5.

	Case No.		Case No.
Nicholson v. *Willan* (1804) ...	61	*Symes* v. *Chaplin* (1836)	30
Sleat v. *Fagg* (1822)	62	*Boys* v. *Pink* (1838)	17
Mayhew v. *Eames* (1825)	73	*Hart* v. *Baxendale* (1851)	90
Marsh v. *Horne* (1826)	63	*Meagher* v. *L. & F.* (1860)... ...	65
Riley v. *Horne* (1828)...	64	*Baxendale* v. *G. E.* (1869)	66
Owen v. *Burnett* (1834)	69	*Millen* v. *Brasch* (1881)	77

(*See Cases for particulars.*)

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61. *Nicholson* v. *Willan.*—Action for £58, value of goods lost, Nottingham to London, during transit by coach. The carrier by his public notice warned sender that he would not be responsible for goods over £5 unless the value was declared and insurance paid. In this case no declaration had been made.

Lord Ellenborough said—"The Judgment must be for the carrier. It was contended on the part of the Plaintiffs that such a special acceptance of goods by a common carrier as is contained in the Defendant's notice is contrary to the policy of the common law, which has made common carriers responsible to an indefinite extent for losses not occasioned by the only excepted causes of loss, by the act of God and the king's enemies. But considering the length of time during which, and the extent and universality in which the practice of making such special acceptances of goods for carriage by land and water has now prevailed in this kingdom, under the observation and with the allowance of Courts of Justice, and with the sanction also and countenance of the Legislature itself, which is known to have rejected a bill brought in for the purpose of narrowing the carrier's responsibility in certain cases on the grounds of such a measure being unnecessary, inasmuch as the carriers were deemed fully competent to limit their own responsibility in all cases by special contract; considering also that there is no case to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility has ever been by express decision denied, we cannot do otherwise

than sustain such right in the present instance, however liable to abuse and productive of inconvenience it may be; leaving to the Legislature, if it should think fit, to apply such remedy hereafter as the evil may require. In the absence, therefore, of any evidence to support the Plaintiff's claim as founded upon a supposed tortuous conversion of the goods in question, and of any valid objection in point of law to the special terms of acceptance contained in the Defendant's, the carrier's notice, we cannot help giving effect to those terms in the notice by which, inasmuch as the goods in question were above the value of £5, and not insured and paid for at the time of delivery, the Plaintiffs are not accountable for the same." Judgment for carrier.—*Tried in Court of King's Bench, November* 27, 1804. —*From East's Reports, vol.* 5, *page* 513.

62. *Sleat* v. *Fagg.*—Action for loss of £1,300, contained in a parcel sent by coach, London to Christchurch, Hants (1822). The value of the parcel was not declared, but it was addressed "per mail." Instead of being sent per mail coach, it was sent by a Southampton light coach at a different hour, and which was not owned by the same persons as the mail coach.

Justice Bayley said—"If the Defendant had sent the parcel by mail in pursuance of his contract, I should have been of opinion that, under the circumstances of the case, he would not have been liable for the loss. But having sent it by a different mode of conveyance, I am of opinion that he is liable." Chief Justice Abbott said—"I cannot say that the non-communication of the contents of the parcel to the carrier, and the directing of it to a clerk of the Plaintiff's for the purpose of concealing its contents, was such a fraud upon the carrier as to make his contract null and void. This is not the case of a negligent performance of the contract, but of a refusal altogether to perform it, for the Defendant did not send the parcel by the Poole mail as he had contracted to do." Judgment against carrier.—*Tried in Court of King's Bench, January*, 1822.—*From Barnewall and Alderson's Reports, vol.* 5, *page* 342.

63. *Marsh* v. *Horne.*—Action for £226, value of two boxes of silk carried, London to Bath. It was admitted that sender

was aware of the carrier's notice as to goods over £5 value, while the carrier knew the boxes contained silk over £5 value. No charge for insurance was offered or demanded, and by tacit consent the boxes went forward. They were lost on the journey. The Jury found a verdict for Plaintiff.

On the appeal case, Chief Justice Abbott said the Judgment must be entered for the carrier. He said—"It was contended on behalf of the Plaintiff, that as the Defendant knew the goods to exceed the value of £5, it lay upon him to demand payment of the insurance, and not having done so he was to be considered as having waived the benefit of his notice, and that there was an incongruity in allowing a carrier to receive goods for the purpose of carrying them, and yet to say that he was not answerable if he did not carry them, and that, as the price of the carriage in this case was to be paid on delivery of the goods, the carrier might then have charged such a reasonable sum as would remunerate him for his labour and risk. We think, however, that there is not any such incongruity as was suggested." Judgment for carrier.—*Tried in Court of King's Bench, Easter Term*, 1826.—*From Barnewall and Cresswell's Reports, vol.* 5, *page* 322.

64. *Riley* v. *Horne.*—Declaration of contents and value of packages of goods. In the case of *Riley* v. *Horne* Chief Justice Best said—"A carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are, and what they are worth, the carrier may refuse to take charge of them, and if he do take charge of them he waives his right to know the contents and value. It is the interest of the owner of the goods to give a true account of their value to a carrier, as in the event of a loss he cannot recover more than the amount of what he has told the carrier they were worth, and he cannot recover more than their real worth, whatever value he may have put on them when he delivered them to the carrier.

"As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his

insurance of their delivery at the place of their destination as for the labour and expense of carrying them. Indeed, besides the risk that he runs, his attention becomes more anxious and his journey more expensive in proportion to the value of his load. If he has things of great value contained in such small packages as to be objects of theft or embezzlement, a stronger and more vigilant guard is required than when he carries articles not easily removed, and which offer less temptation to dishonesty. He *must* take what is offered to him to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage.

"If the extent of the risk is ascertained in cases in which persons are not obliged to insure, and, if they do insure, may fix their own rate of premium, there is greater reason for ascertaining it where one is compelled to become an insurer, and can only charge what the magistrates in sessions, if they think proper to settle the rates of carriage, will allow under the statute of William and Mary, and, where no such rates are made, what a jury shall think reasonable."

Act 3 *William and Mary, cap.* 12, *sec.* 24.—And whereas divers waggoners and other carriers by combination amongst themselves have raised the prices of carriage of goods in many places to excessive rates, to the great injury of "trade," be it therefore enacted by the authority aforesaid, that the Justices of the Peace of every county and other place within the realm of England or dominion of Wales shall have power and authority, and are hereby enjoined and required at their next respective quarter or general Sessions after Easter day, yearly to assess and rate the prices of land carriage of goods whatsoever to be brought into any place or places within their respective limits and jurisdictions by any common waggoner or carrier, and the rates and assessments so made, to certify to the several mayors and other chief officers of each respective market town, within the limits and jurisdictions of such Justices of the Peace, to be hung up in some public place, in every such market town to which all persons may resort for their information, and that no such common waggoner or carrier shall take for carriage of such goods and merchandize above the rates and prices so set, upon pain to forfeit for every such offence the sum of five pounds, to be levied by distress and sale of his or their goods, by warrant of any two Justices of the Peace, where such waggoner or carrier shall reside in manner aforesaid, to the use of the party so grieved.—*Repealed by the Stat. Law Rev. Act*, 1867, 30 & 31 *Vic., cap.* 59.

"Although a carrier may prove that the owner of the goods knew that the carrier had limited his responsibility by a sufficient notice, yet if a loss be occasioned by gross negligence the

notice will not protect him. Every man that undertakes for reward to do any service obliges himself to use due diligence in the performance of that service. Independently of his responsibility as an insurer, a carrier is liable for gross negligence. This point is settled by *Sleat* v. *Fagg*, *Wright* v. *Snell*, *Birkett* v. *Willan*, *Beck* v. *Evans*, and *Bodenham* v. *Bennett*. The Jury are to decide what is gross negligence.

"If a notice touching the responsibility of the carrier be given, it matters not by whom it is given, or in what form, if it tells the owner of the goods that the carrier by whom he proposes to send them will not undertake for their safe conveyance unless paid a premium proportioned to their value.

"We have established these points: That a carrier is an insurer of the goods which he carries; that he is obliged for a reasonable reward to carry any goods to the place to which he professes to carry goods that are offered to him if his carriage will hold them, and he is informed of their quality and value; that he is not obliged to take a package the owner of which will not inform him what are its contents and of what value they are; that if he does not ask for this information, or if when he asks and is not answered he takes the goods, he is answerable for their amount, whatever that may be; that he may limit his responsibility as an insurer by notice, but that a notice will not protect him against the consequences of gross negligence."—*Tried in Court of Common Pleas, November* 12, 1828.—*From Bingham's Reports, vol.* 5, *page* 220.

65. *Meagher* v. *Limerick and Foynes Railway Company.*—Action for £12 10s. 6d. for two pieces of silk enclosed in a box sent from Rathkeale to London, alleged to have been stolen. The Company admitted (1) receipt, (2) that the silks were in the box, (3) value, (4) loss, (5) non-exhibition of rates for goods declared over value of £10. Plaintiff admitted non-declaration of value and acceptance of an ordinary receipt note. Plaintiff pleaded that under 8th section of Carriers' Act the Company were responsible for the felony of their servants, and under 3rd section liable from not exhibiting rates for goods declared over £10 value. Company pleaded that as no proof of felony was given the section did not apply, and that the other

section did not apply as Plaintiff did not declare the value over £10, and cited *Metcalf* v. *London Brighton and South Coast Railway*, 4 C. B., N. S. 311. Judge concurred with Company's pleas, reversed the decree of the Court below, and dismissed the civil bill without prejudice.—*Tried before Justice Hayes, Limerick Summer Assizes*, 1860, *on appeal from Quarter Sessions.—Irish Railway Clearing House Reports.*

66. *Baxendale* v. *Great Eastern Railway Company.*—Action for £84 for a case of pictures lost, Rotterdam to London, *via* Harwich. The case was received at Rotterdam on a bill of lading, and no declaration of value was made. It was lost after leaving Harwich on the journey, Harwich to London. Plaintiffs contended the carriage of the case was by special contract, which superseded the provisions of the Carriers' Act, and consequently a declaration of value over £10 was not necessary and the Carriers' Act did not protect the Company. The Company contended the reverse. On the first trial a verdict was entered for Plaintiffs for £84. An appeal was taken to the Queen's Bench, who gave Judgment for the Company. Plaintiffs then appealed to the Exchequer Chamber, when Chief Baron Kelly gave Judgment. He said—"We are of opinion the Judgment must be affirmed for the Company. Plaintiffs contend that the contract upon which these goods were delivered to the Company, and were to be conveyed by them in effect from Rotterdam to London, is a contract by means of a bill of lading; and that that bill of lading, which is a marine contract, imports that they were to be conveyed by the Company in their capacity of carriers by water. It is perfectly clear the bill of lading contemplated conveyance, Harwich to London, by water and by railway. The contract therefore contemplates a conveyance partly by land, and the contract being divisible the first objection of Plaintiffs falls to the ground."

Baron Channell said—"Conceding for a moment that there is a special contract here, it is not such a contract as excludes the Company from availing themselves of the protection of section 1 of the Carriers' Act, for section 6 only provides that nothing in the Act 'shall extend or be construed to annul or

anywise affect any special contract between a common carrier and any other parties for the conveyance of goods.' In other words, though a common carrier has entered into a special contract, he may avail himself of the protection of the Act, provided the terms of the contract are not inconsistent with such protection."

Chief Baron Kelly said—"Under all the circumstances it appears to us all that the true effect of this contract by means of the bill of lading is, that these goods were delivered, as far as relates to the conveyance of them from Harwich to London, to the Company in their character of common carriers, and they were to have all the liabilities of common carriers except only those which are exempted in the bill of lading, and they are also entitled as common carriers to the protection from liability which was conferred upon them by the Act of Parliament." Barons Channell, Pigott, and Cleasby, and Justices Byles, Keating, and Smith concurred. Judgment for Company. —*Tried in the Exchequer Chamber, February* 2, 1869.—*Law Journal Reports, vol.* 38, *page* 137.

SINCE THE CARRIERS' ACT OF 1830, THE CARRIER CANNOT BE HELD RESPONSIBLE FOR LOSS ON THE GROUND OF "GROSS NEGLIGENCE" IN RESPECT TO ARTICLES SPECIFIED IN THE ACT AND UNDECLARED.

	Case No.		Case No.
Smith v. *Horne* (1818)	67	*Owen* v. *Burnett* (1834)	69
Birkett v. *Willan* (1819)	217	*Hinton* v. *Dibbin* (1842)	70
Duff v. *Budd* (1822)	218	*Butt* v. *Great Western* (1851) ...	51
Brooke v. *Pickwick* (1827)	68	*Great Western* v. *Rimell* (1857)	52

DIGEST.

In *Smith* v. *Horne* (1818) a parcel of the value of £67, Worcester to London, was stolen off the carrier's delivery cart in London in the course of delivery. Justice Park, on the appeal case, concurred with the verdict of the jury, and held that there was "gross negligence," and the carrier's notice would not exempt him from liability

In *Birkett* v. *Willan* (1819) a box, the value of which was undeclared, was delivered to a wrong consignee. On the appeal case by Plaintiff he urged that it was a case of gross negligence, quoting the case of *Bodenham* v. *Bennett*, and the Judge, who had tried the first case, in a measure admitted this by granting a new trial.

In *Duff* v. *Budd* (1822) a parcel of silk, undeclared, had been delivered to the wrong person, in fact, to a swindler. Lord Chief Justice Dallas said—"If this were not negligence there would be an end of carriage for hire, for who would be safe if a carrier might deliver a parcel to a person of whom he is altogether ignorant and whose residence is unknown to him, when he must have well known the person to whom it was directed not only by name but by residence?"

In *Brooke* v. *Pickwick* (1827) a trunk of passenger's luggage, over £5 value, was lost at or near Taunton off the coach, and a mile from Taunton the trunk was found in a field rifled of its contents. No declaration of value had been made, but the carrier's notice was properly exhibited. The trunk must have been taken at mid-day. Chief Justice Best held the trunk was lost through gross negligence, and held the carrier liable.

In *Owen* v. *Burnett* (1834) Baron Bayley said—"The supposed negligence here imputed is that of carrying a package containing glass on a truck for a mile along a hard, smooth road. . . . No wrongful act of gross negligence amounting to misfeazance having been established to take the case out of the protection intended by the statute. Gross negligence has in many cases been held to affix a liability on a carrier to which he would not have otherwise been subject. Thus, had the carrier dashed the glass on the ground, that wrongful act would have made him liable."

In *Hinton* v. *Dibbin* (1842) it was the first case tried under the new Carriers' Act, 11 Geo. IV. and 1 Will. IV., cap. 68, and it was held that the allegation of gross negligence was not an answer to a defence that the

goods are within those enumerated in Carriers' Act and are over £10 in value, and are undeclared.

In *Butt* v. *Great Western* (1851) Justice Cresswell said—"The statute takes away the Company's liability as to gross carelessness in respect to the excepted articles (when not declared), but has reserved it as to felony ; but it does not make the remedy in case of felony larger than at common law. If, therefore, it was necessary at common law to prove gross negligence as well as felony, it must still be so."

In *Great Western* v. *Rimell* (1857) Chief Justice Jervis said—"When the Defendants rely upon the statute for their defence, negligence has nothing to do with the question. The rule is this — under the statute felony by a servant is a sufficient answer to the defence set up by the carrier, and negligence has no effect one way or the other. Where the defence is independent of the statute, negligence alone is a sufficient answer. Under the statute felony is an answer. Under the carrier's notice negligence is an answer. We only decided (in *Butt* v. *Great Western*) that felony by the Company's servants, without negligence on their part, was not a good answer to a defence that the value of the goods was not declared according to the notice."

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67. *Smith* v. *Horne*.—Action £67 9s. 6d., value of a parcel carried by coach, Worcester to London. The parcel reached London safely, but was lost in the course of delivery from the carrier's cart (stolen). It was usual for the Defendant and most other carriers to send two carters, whereas, in this case, only one man was sent with the cart. Plaintiff contended that by sending one man only with the cart constituted "gross negligence." The value of the parcel was not declared, and the carrier's notice as to parcels over £5 in value was proved. The Jury gave Plaintiff a verdict on the ground of "gross negligence."

On the appeal case Justice Dallas said—"If negligence could be imputed to the Defendants I am of opinion that

evidence to prove it was admissible under the declaration as now framed, and the verdict of the Jury should not be disturbed."

Justice Park said—"A case of grosser negligence than this I have hardly ever known. The doctrine of carriers exempting themselves from liability by notice has been carried much too far. I see nothing in the objections which have been urged by Brother Best to induce me to think that the verdict is not perfectly right."

Justice Burrough—"The doctrine of notice was never known until the case of *Forward* v. *Pittard*, which I argued many years ago. Notice does not constitute a special contract. If it did it must be shown on the record; it only arises in defence of the carrier, and here it is rebutted by proof of positive negligence. I lament that the doctrine of notice was ever introduced into Westminster Hall." Judgment against carrier.—*Tried in Court of Common Pleas, Jan.* 27, 1818.—*From Taunton's Reports, vol.* 8, *page* 144.

68. *Brooke* v. *Pickwick.*—Action for the loss of a trunk containing female apparel, passenger's luggage by coach, Bath to Exeter. At Taunton there was a change of coach, and it was alleged the trunk was transferred from the boot of one coach to the top of the other. At Exeter the trunk was short, and was afterwards found rifled of its contents in a field about a mile from Taunton. It appeared the value was over £5, but it had not been declared. The carrier's notice was properly exhibited, but there was no evidence as to whether plaintiff had seen it.

Chief Justice Best, on the appeal case, held that the trunk had been lost through gross negligence, and confirmed the verdict of the Jury. He said—"If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and at the same time to place in his hands a printed paper specifying the precise extent of their engagement. If they omit to do this they attract customers under the confidence inspired by the extensive liability which the common law imposes on carriers, and then endeavour to elude that liability by some limitation which they have not been at the pains to make

known to the individual who has trusted them. The merely putting up a board in their office ought not to satisfy a jury that they have been at the pains to make a customer understand beforehand the limitation under which, after a loss, they seek to elude their general responsibility. I wish, therefore, that these notices had never been holden sufficient to limit the carrier's responsibility. It is too late, however, now to hold that they are without effect when the customer is distinctly informed of their existence. But, though the Judges have holden that they will in such a case exempt the carrier from his common law responsibility as an insurer, it has never been decided that they will excuse him from the consequences of gross negligence. If the Jury found that there was gross negligence, and they could not find otherwise under the circumstances of this case, the trunk having been lost at mid-day, it is immaterial whether the carrier has been apprised of the value of the article or not. He must have supposed in the present instance, from the size of the trunk and the condition of the passenger, that it was worth more than £5, and where is the line to be drawn if passengers are always to disclose the extra value of their luggage?" Judgment against carrier. —*Tried in Court of Common Pleas, May* 26, 1827.—*From Bingham's Reports, vol.* 4, *page* 218.

69. *Owen* v. *Burnett.*—Action for £37, value of a large looking-glass, broken in transit by road, London to Lymington. The value of the glass was not declared. Consignee's house was about a mile from Lymington, and the glass was carried from the carrier's office this distance by the carrier on a long narrow brewer's truck without springs. On the first trial the Jury found negligence by the carrier, and gave Plaintiff a verdict for £37.

On the appeal case Baron Bayley said—"The supposed negligence here imputed is that of carrying a package containing glass on a truck for a mile along a hard, smooth road. But if that mode of carriage was not the safest, still, had the carrier been informed of the value, he might have used a greater caution, amounting to extraordinary diligence. In this case the carrier was only paid according to the rate for

an ordinary risk, though notice was fixed in the office of the terms on which glass (under Carriers' Act) would be carried. I think that this case is within the Act, and that therefore the Plaintiff cannot recover for the loss; no wrongful act, or gross negligence amounting to a misfeazance, having been established to take the case out of the protection intended by the statute. Gross negligence has in many cases been held to affix a liability on a carrier to which he would not have otherwise been subject. Thus, had the carrier dashed the glass on the ground, that wrongful act would have made him liable. In one case where the carrier was held liable as for gross negligence, he delivered the article to a wrong person *(Birkett* v. *Willan* and *Duff* v. *Budd)*. In others, a mode of conveyance different from that agreed for was substituted *(Garnett* v. *Willan* and *Sleat* v. *Fagg)*. In another, the article was carried to a point beyond the right one, or (as in *Smith* v. *Horne* and *Batson* v. *Donovan)* it was left unprotected in a street in London. In all these cases misfeazance had taken place, whereas here there was no misfeazance or gross degree of negligence throwing the responsibility on the carrier notwithstanding the Act." Barons Vaughan and Gurney concurred. Judgment for carrier.—*Tried in Court of Exchequer, Hilary Term,* 1834.—*From Tyrwhitt's Reports, vol.* 4, *page* 135. (The carrier's charges for insurance were:—For 50 miles, ½d. per lb.; for 75 miles, ¾d. per lb.; for 100 miles, 1d. per lb.; for 150 miles, 1½d. per lb.; for 200 miles, 1¾d. per lb.; for 250 miles, 2d. per lb.)

70. *Hinton* v. *Dibbin.*—Action for value of a bale of silk lost between London and Calne by road carriage. The value was over £10, but had not been declared to the carrier when delivered at "Gerard's Hall Inn," Basing Lane, the carrier's receiving house. Plaintiff charged the carrier with "gross negligence." The carrier pleaded the Carriers' Act, 11 Geo. IV. and 1 Will. IV., cap. 68. This was the first case tried under this Act, which Act had superseded the carriers' ordinary notices. Plaintiff contended that the carrier was guilty of such gross and culpable negligence and wrongful and improper conduct that, by their gross and utter neglect, wilful default,

and entire and absolute want of care and caution, the said silk was lost.

Chief Justice Lord Denman reviewed at some length the condition of the law and the decisions before the passing of this Carriers' Law, and concluded by saying—"We are, therefore, unfettered by any authority in putting that construction upon the statute which we think it requires, and our Judgment must be for the carrier." Thus the plea of "gross negligence" is not operative as an answer when the goods are within those enumerated in Carriers' Act, and are over £10 in value, and are undeclared.—*Tried in Court of Queen's Bench, Hilary Term,* 1842.—*From Adolphus & Ellis' Reports, vol.* 2, *page* 646.

EXHIBITION OF NOTICE AT CARRIER'S RECEIVING PLACE.

	Case No.		Case No.
Butler v. *Hearne* (1809)	71	*Brooke* v. *Pickwick* (1827) ...	68
Clayton v. *Hunt* (1811)	72	*Collis* v. *Mid. G. W.* (1868) ...	74
Mayhew v. *Eames* (1825)... ...	73		

DIGEST.

In *Butler* v. *Hearne* (1809) the carrier nailed upon his office door a hand-bill stating, in large print, the many advantages belonging to the waggon, and, in very small characters at the bottom, that the owner would not be answerable for goods above the value of £5 unless entered as such and paid for accordingly. Lord Ellenborough said—"If a common carrier is to be allowed to limit his responsibility, he must take care that everyone who deals with him is fully informed of the limits to which he confines it." Judgment against carrier.

In *Clayton* v. *Hunt* (1811)—which was in the old carriers' time—Hunt had a printed notice stuck up in his office at Oxford, where the business of the waggon was transacted; cards of a similar purport had been circulated about the town, an advertisement had been published in the Oxford newspapers, *but there was no notice on the cart* which went round to receive goods,

and there was no evidence that any of the cards or newspaper advertisement had ever been seen by Plaintiff. It was held, on appeal, that the notice in the office ought to be in such large characters that no person delivering goods there can fail to read it without gross negligence. The lost box had been collected by the carrier's cart.

In *Mayhew* v. *Eames* (1825) the Plaintiffs' agent collected money at Downham and sent it to London, addressed "Mourning," not declaring value. As to the carrier's notice, the Court held—"Now, when a parcel came to the Plaintiffs in this way before, they must have seen the notice, because it was contained in the same paper which they must have looked at in order to ascertain the amount of the charge for carriage and porterage which they had to pay." Judgment for carrier.

In *Collis* v. *Midland Great Western* (1868) £50 was claimed for loss of three small boxes of broken gold, gold lace, silver lace, trinkets, and jewellery. Sender told the clerk the boxes contained "broken gold, silver lace, and other things," but did not declare the value. Plaintiff contended the carrier's notice was posted inside on the wall of the office, but from the counter where sender delivered the boxes it was too far away for him to be able to read. Chief Baron Pigott said—"I am clearly of opinion that the notice was not affixed in a 'public, conspicuous place' of the parcels office, within the meaning of the Act." He felt bound, however, by *Hart* v. *Baxendale*, that the first step of declaring the value rested with sender. Judgment for Company.

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71. *Butler* v. *Hearne.*—Action for the loss of a trunk valued at over £5, carried by road, Cheltenham to London. At Cheltenham the only mode taken to publish the carrier's notice was by nailing upon the office door a hand-bill stating, in large print, the many advantages belonging to the waggon, and, in very small characters at the bottom, that the owner would

not be answerable for goods above the value of £5 unless entered as such and paid for accordingly, which was not done in this instance.

Lord Ellenborough said—"This is not enough to limit the Defendant's common law liability. We have not sufficient evidence of any special contract. The Jury ought to believe that at the time when the trunk was delivered at the waggon office at Cheltenham the Plaintiff or his agent there saw, or had ample means of seeing, the terms on which the carrier carries on his business. How can this be inferred from the hand-bill nailed on the door, which called the attention to everything that was attractive, and concealed what was calculated to repel customers? If a common carrier is to be allowed to limit his responsibility, he must take care that every one who deals with him is fully informed of the limits to which he confines it." Judgment against carrier.—*Tried at Nisi Prius, March* 3, 1809.—*From Campbell's Reports, vol.* 2, *page* 415.

72. *Clayton* v. *Hunt.*—Action for the loss of a box valued at £21, Oxford to London, by road carrier. Plaintiff was a student at University College, Oxford, and the box was collected by the cart going round the town for that purpose. The carrier contended he had given notice that he would not be liable for any package above the value of £5 unless insurance was paid upon it. This box had not been declared, and no insurance was paid. The carrier had a printed notice stuck up in his office at Oxford, where the business of the waggon was transacted; cards of a similar purport had been circulated about the town, an advertisement to the same effect had been published in the Oxford newspapers, but there was no notice on the cart which went round to receive the goods, and there was no evidence that any of the cards had ever been seen by Plaintiff, or that he read any newspaper containing the advertisement.

Lord Ellenborough held that the carrier in this case had not discharged himself from his common law liability, and gave a Judgment against the carrier for £21.

In the ensuing term the Court refused a rule to show cause

why there should not be a new trial in this case, saying that the notice in the office ought to be in such large characters that no person delivering goods there can fail to read it without gross negligence; and that if a carrier's servant receives goods at a distance from the office, the special terms on which he deals ought to be communicated through some other medium. —*Tried at Nisi Prius, July* 4, 1811.—*From Campbell's Reports, vol.* 3, *page* 27.

73. *Mayhew* v. *Eames.*—Action for £87, contained in a parcel, and consisting of bank notes, which was addressed "Mourning," Downham (Norfolk) to London, by coach. The money had been collected by Plaintiffs' agent, Hughes. The carrier's notice limiting liability to £5 could not be brought home to Hughes. The value of the parcel was not declared. The Court held that "here the agent was employed to transmit bank notes, which are the subject of the present action; and it appears that the Plaintiffs themselves had knowledge that the Defendants would not be responsible for bank notes, because it is in evidence that many parcels came to them from the Defendants, and that the porter delivered together with such parcels a printed paper, containing a notice that 'the proprietors of carriages setting out from the "White Horse," Fetter Lane, would not hold themselves accountable for any glass, china, plate, watches, writings, cash, *bank notes*, or jewels of any description, however small the value.' Now, when a parcel came to the Plaintiffs in this way before, they must have seen the notice, because it was contained in the same paper which they must have looked at in order to ascertain the amount of the charge for carriage and porterage which they had to pay. It was the duty of Plaintiffs to have told their agent not to send parcels containing bank notes by the coaches coming to the 'White Horse,' Fetter Lane." Judgment for carrier.—*Tried in Court of King's Bench, January* 24, 1825.—*From Barnewall & Cresswell's Reports, vol.* 3, *page* 601.

74. *Collis* v. *Midland Great Western Railway Company.* —Action for £50 for loss of three small boxes containing broken gold, gold lace with the cotton burnt from it, silver lace, trinkets, and jewellery—Galway to Dublin. Sender was

asked by the Company's clerk at Galway if the boxes contained watches. He said no; they contained "broken gold, silver lace, and other things." Plaintiff, however, did not declare the value. The boxes were lost. The case was first tried before the Galway Recorder and a Jury, when a verdict was given for £6 10s. The Company appealed against this, on the ground that the declaration was not made. It was admitted that the carrier's notice of the Act (7 Will. IV., cap. 68) was posted inside on the wall of the office, but from the counter where sender delivered the boxes it was too far away for him to be able to read the notices; and Plaintiff pleaded accordingly. Chief Baron Pigott said—"In the case of *Hart* v. *Baxendale* it was laid down that the sender of goods was bound, in order to fix responsibility, to take the first step by declaring the value and nature of the goods, even though the present notice was not posted; and I feel bound to decide in conformity with that view, though I confess reluctantly. I am clearly of opinion that the notice was not affixed in 'a public and conspicuous place' of the parcel office, within the meaning of the Act of Parliament." Judgment for Company.—*Tried at Galway Summer Assizes, July* 29 *and September* 1, 1868.—*From Law Times, vol.* 19, *page* 150, *taken from Irish Law Times.*

Where the Goods are Over-Carried, or sent the Wrong Route, and Damaged or Lost.

	Case No.		Case No.
Garnett v. *Willan* (1821)	75	*Morritt* v. *North Eastern* (1876)...	76
Sleat v. *Fagg* (1822)	62	*Millen* v. *Brasch* (1881)	77

(*See cases for particulars.*)

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75. *Garnett* v. *Willan.*—Action for £45, value of two pieces sarsenet contained in a package to be sent by coach, London to Worcester, and lost in transit. The value was not declared. The Defendants were Willan & Jones, and they ran a coach from London to Worcester from the "Bull and Mouth" Inn. Willan was also a partner in a heavy coach that ran from the "Green Man and Still" Inn, Oxford Street, London, to

Worcester. The parcel was taken from the "Bull and Mouth" Inn by the Worcester coach to the "Green Man and Still" Inn, and there transferred and sent forward by the heavy coach, in which Jones had no ownership.

Justice Bayley said—"The Plaintiff is entitled to recover. The true construction of the carrier's notice seems to me to be this, that the carrier is not to be protected by the words 'lost or damaged' if he divests himself wilfully of the charge of the parcel entrusted to his care, because he thereby divests himself of his character of carrier of the thing entrusted to his care. The words 'lost or damaged' ought to be qualified thus: 'The carrier himself does nothing by his own voluntary act or the act of his servants to divest himself of the charge of carrying the goods to the ultimate place of destination.' Now, when the Plaintiff sent his parcel by Willan & Jones, he had a right to have the care and attention of both these persons, and when he had the care and attention of one only he had not the care and attention for which he originally contracted. Willan & Jones have therefore, by the act of their servant, divested themselves of the charge of carrying this parcel to its ultimate place of destination, and upon that principle I am of opinion that they are not protected by their notice." Justices Holroyd and Best concurred. Judgment against carrier.—*Tried in Court of King's Bench, October* 26, 1821.—*From Barnewall & Alderson's Reports, vol.* 5, *page* 53.

76. *Morritt* v. *North Eastern Railway Company.*—Action for £75 for two pictures, original drawings, of Rokeby Hall. The pictures were in wooden frames, bound face to face with tape, and the canvas exposed at back, so that their nature and fragility could be easily seen. They were carried as passenger's luggage, York to Darlington. No value was declared. By accident the pictures were over-carried to Durham, and, when returned to Darlington, were found to have been mutilated, but how done there was no evidence to show. On the first trial Plaintiff obtained a verdict for £75. The Company appealed, and Judge Blackburn said—"Now, though the pictures are not properly passenger's luggage, that question does not really arise here, and the sole point we have to determine is whether

the provisions of the Carriers' Act apply so as to exempt the Railway Company from liability. If the Company had put the pictures out of the guard's van at Darlington, they would have been bailees (not carriers), and bound to take reasonable care of them afterwards; and if it had been proved that they neglected to take such ordinary care as ought to have been taken, and that the damage complained of was the consequence, there would be little difficulty. But that has not been done here. We have no evidence how the damage occurred, and I can draw no inference of fact from the circumstance that there was a hole through the glazed paper when returned from Durham that there was any gross negligence. It has been argued that protection by the Carriers' Act only extends in such a case as long as such property is being carried in connection with the contract, and that as soon as it is taken off the line of carriage the carrier ceases to have the protection afforded him by the statute. I cannot accede to such a view. The statute protects carriers in an unqualified way. If carriers were wilfully to damage goods or dispose of them to another, they would then be liable, because the loss would in no way be connected with their character as carriers. It is clearly intended that no responsibility shall be incurred in such a case as this unless the carrier gets proper compensation." Justices Quain and Field concurred. Judgment for Company, setting aside the verdict for £75.—*Tried in Court of Queen's Bench, January* 11 *and February* 15, 1876.—*From Law Journal Reports, vol.* 45, *page* 289.

77. *Millen* v. *Brasch & Company.*—Action for £210 damages for injury to contents and temporary loss of a trunk of clothes, which contained silk dresses, £36, and sealskin jacket, £4. The contents were not declared, nor the value. The trunk was delivered to Defendants in London to be carried to Rome, and should have been sent to Liverpool, and thence per steamer; whereas it was crossed with another package and sent to the Victoria Docks, London, and from thence to New York. This occurred on 13th November, and it was not until 15th December the mistake was discovered. The trunk was got back from New York to London on 11th March, and lay

with the carriers till June, when Plaintiff accepted it. The carriers paid £5 into Court. Plaintiff also claimed £10 for articles bought in Rome at enhanced prices, owing to the loss of the trunk. At the trial, before Justice Lopes, the Jury were discharged by consent, and all questions of fact and law were left to the learned Judge.

Justice Lopes, in giving Judgment, said—"The Plaintiff contends that the Carriers' Act does not apply to this case, because the loss was temporary and not permanent. There is nothing in the Carriers' Act, and no authority which would justify so narrow a construction to be put upon the word 'loss.' I think it immaterial whether the loss is temporary or absolute. The trunk and its contents, not being delivered within a reasonable time, were lost to the owner within the meaning of the Act. The Plaintiff also contended that the Carriers' Act did not apply, because the carriers were not carriers of the trunk by land. The trunk was accepted to be carried partly by land and partly by sea. *Le Conteur* v. *London and South Western* is an authority to show, where there is one entire contract to carry partly by land and partly by sea, that the contract is divisible, and that as to the land journey the carrier is within the protection of the Act if the loss arises during the transit by land. I think the trunk was lost in its transit from the Defendants' receiving house. It ought to have gone to the railway to be conveyed to Liverpool. It went to the Victoria Docks (London). Directly it was on its wrong road it was lost to the owner within the meaning of the Carriers' Act. Again, it was contended by the Plaintiff that the carriers were not entitled to the protection of the Carriers' Act because they were wrongdoers, wrongdoers in that they sent the trunk on the wrong road, and not on the journey contracted for. *Morritt* v. *North Eastern* is an answer to this objection. Justice Blackburn there says—'Unless it is proved the misdelivery was intentional the case is within the Act.' In that case pictures had been sent beyond their destination. Lord Justice Mellish also says, in the Appeal Court—'If goods, by the negligence of the carrier, are carried beyond the point of destination and injured, this is within the Carriers' Act.' I can see no distinction in principle between that case and the present. This

objection therefore fails. It was, lastly, contended by the Plaintiff that he was entitled to recover the £10 for repurchase of other articles in Rome at enhanced prices irrespective of the Carriers' Act, and that the Carriers' Act did not apply to that portion of his claim. I think the Plaintiff is right, for this is not a loss by the carrier of the trunk nor an injury to its contents, but damages sustained by the owner in consequence of the non-delivery within due time; it is something consequential to its loss. I do not think this £10 is within the protection of the Carriers' Act. But the carrier says if it is not within the protection of the Carriers' Act this portion of the claim is too remote. Much depends upon whether it was a reasonable and necessary act of the Plaintiff to buy these articles in Rome. This is a question of fact which I have to decide, and I think it was both the reasonable and necessary consequence of Defendants' failure to deliver that the Plaintiff should purchase what he did in Rome, a necessity arising from the non-delivery of a trunk which the Defendants might fairly assume contained wearing apparel. I think the Plaintiff would have gone to the same expense and bought the same articles for the use of his wife if there had been no railway carrier company to look to, and if the trunk had been lost by his own fault. There was nothing extravagant or unreasonable in his so doing. I do not think these damages too remote. I give Judgment for the Plaintiff for £5, beyond the £5 paid into Court, with costs."—*Tried in Court of Queen's Bench, November* 26, 1881.—*From Law Times Reports, vol.* 45, *page* 653.

WHERE THERE IS FRAUD ON THE PART OF SENDER IN CONCEALING THE VALUE ENCLOSED IN THE PACKAGES.

Case No.
Gibbon v. *Paynton* (1769) 93

DIGEST.

In *Gibbon* v. *Paynton* (1769) the Plaintiff tied £100 cash in hay in an old nail bag, and sent it, Birmingham to London, to save paying the insurance of 3d. in the

pound sterling. The bag was lost. Lord Mansfield held that "if the owner of the goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier. And here the owner was guilty of a fraud upon him; the proof of it is abundant."

WHERE SENDER'S INVOICE PRICE OF THE GOODS WAS OVER £10, BUT THE DISCOUNT ALLOWED BY SENDER BROUGHT THE ACTUAL CASH PAYMENT BY CONSIGNEE UNDER £10.

Case No.

Blankensee v. *London & North Western* (1881) 78

DIGEST.

In *Blankensee* v. *London & North Western* (1881) a parcel of jewellery was invoiced by sender to consignee at £11 14s., but sender's discount brought the price down to £9 19s., which sender claimed owing to loss of goods which had not been declared. Chief Justice Coleridge held that the value means the value to the sender of the goods, and which consignee had contracted to pay, and which had been invoiced to consignee. Judgment for Company.

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78. *Blankensee* v. *London and North Western Railway Company.*—Action for £9 19s., value of a parcel of jewellery lost in transit between Birmingham and Ballymoney. The price at which the jewellery was invoiced by sender to consignee was £11 14s., but sender allowed a discount of 15 per cent., which, it was contended, reduced the value to the amount claimed. The value of the parcel was not declared, and the Company contended, the real value being over £10, they were protected by the Carriers' Act. The case was first tried before the Judge of County Court at Birmingham, and he gave a verdict for the Company.

Plaintiff appealed, and on the appeal case Chief Justice Coleridge said—"I confess I entertain no doubt on this matter. "Value" means the value to the sender of the goods. The value of the goods to the sender is that which his consignee

has contracted to pay. The consignee here had contracted to pay £11 14s. What the sender charged to the consignee, what he declared to be the value to him as between himself and the consignee, was £11 14s. Why should there be two separate values? It is quite plain the invoice price of the goods to the consignee is the value of the goods to the sender, and it is not what he may have contracted to pay another person for them that is the value of them. He may have them as a gift, and is the value nothing to him because he has really paid nothing for them? The question seems to me very clear indeed, and I think the Judgment was right, and must be affirmed."

Justice Manisty said—"I am of the same opinion. I think the test is this: Suppose the Carriers' Act had never passed; suppose there had been no protection at all, and this parcel had been lost, can anyone doubt but that the plaintiff, in an action for the recovery of the value, could have recovered the amount which the article was worth to them?" Judgment for Company.—*Tried in Court of Queen's Bench, June* 23, 1881.—*From Law Times Reports, vol.* 45, *page* 761.

DECLARATION OF VALUE OMITTED, THE GOODS TEMPORARILY LOST, BUT SUBSEQUENTLY RECOVERED.

	Case No.		Case No.
Hearn v. *London & South Western* (1855)	79	*Wallace* v. *D. & B. J.* (1874) ...	80
		Millen v. *Brasch* (1881)	77

(*See cases for particulars.*)

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79. *Hearn* v. *London and South Western Railway Company.*—Action for £30 expended in replacing and substituting title deeds and leases lost from 3rd June to 23rd September in a portmanteau, passenger's luggage, London to Southampton. The claim was practically for delay. The Company pleaded the Carriers' Act, 11 Geo. IV. and 1 Will. IV., cap. 68, sec. 1, the contents of the portmanteau not being declared as of value over £10 or as containing title deeds. It was held by the Court that the Act does not protect carriers in all cases where the owner of the article sustains damage from the neglect of

the carrier, but the loss there referred to is confined to those cases where the article is abstracted or lost from the personal care of the carrier. (It would seem that if the portmanteau had never been found the Company would not on this trial have been liable.) Judgment against Company.—*Tried in Court of Exchequer, February* 13, 1855.—*From Law Journal Reports, vol.* 24, *page* 180, *Ex.*

The Company carried the case to the Court of Appeal, but here Judgment was given for the Company. Lord Justice James said—"It seems to me clear that the damage took place whilst the Company had charge of the goods as carriers, and that they were therefore protected by the Act, and not liable to the Plaintiff."—*Tried in Court of Appeal, February*, 1876. —*From Law Times Reports, vol.* 34, *page* 940.

80. *Wallace* v. *Dublin and Belfast Junction Railway Company.*—Action in respect to goods of the description mentioned in the Carriers' Act, and exceeding £10 in value. It appeared the goods in question had been temporarily lost while in the carriers' charge, but after considerable delay they were found and sent on to Birmingham, their destination. The Plaintiff contended that the Carriers' Act does not exempt carriers from liability for delay in the carriage of goods, but only from liability for actual loss, and that the loss mentioned in the Carriers' Act, and from which by such Act carriers are exempted, means actual loss, and not temporary loss.

Justice Morris said—"If the goods had been wholly lost and never delivered, the Defendants would have been protected by the Carriers' Act, and a plea of the loss would have been good. Are we, then, to say that the Company, who would not have been liable had they taken no steps to recover the goods, are to be held liable because they succeeded in recovering them? On the authority of *Hearn* v. *London and South Western Railway* and *Pianciani* v. *London and South Western Railway*, and for the reasons I have mentioned, I am of opinion that the Company's defence, as pleaded, is good. Whether it be true in fact is for another tribunal to determine." Judgment for Company.—*Tried in the Court of Common Pleas, June* 14, 1874.—*From Irish Reports, Common Law, vol.* 8, *page* 341.

DETERMINING WHETHER ARTICLES COME WITHIN THE CARRIERS' ACT RESTS WITH THE JURY AS A MATTER OF FACT.

Case No.
Woodward v. *London and North Western* (1878) 81

DIGEST.

In *Woodward* v. *London and North Western* (1878) the question was whether carpet designs painted in colours were pictures within the Carriers' Act. Justice Hawkins, on appeal, said—"I think the question whether the lost articles fell within the Carriers' Act one of fact for the Jury to determine. I think the Jury properly came to the conclusion that they did not. Whether they (articles) do so or not must always be a question for the Jury, subject, of course, to the control which the Court exercises over verdicts if they are manifestly wrong."

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81. *Woodward* v. *London and North Western Railway Company.*—Action for £148 for a parcel containing twenty rug designs, eleven carpet models, and ten working designs, varying in value up to £6 each. The Plaintiff was travelling as a passenger, using these designs as patterns to procure orders, and the parcel was passenger's luggage. The designs were painted in colours. The case was first tried at the London Hilary Sittings, 1877, before Baron Cleasby, when the Company contended that the articles were "paintings" within the meaning of the Carriers' Act, and, their value not having been declared, the Company were not liable. The question of whether they were "paintings" within the Act was left to the Jury, who decided they were not, and gave Plaintiff a verdict for £148. The Company appealed for a new trial, on the ground of misdirection on the part of the Judge in leaving the case to the Jury, and that the verdict was against the weight of the evidence.

On the appeal case, Justice Hawkins read his Judgment—"I am of opinion our Judgment must be against the Company.

I think the question whether the lost articles fell within the Carriers' Act one of fact for the Jury to determine (this was expressly decided in *Brunt* v. *Midland Railway*), and I think the Jury properly came to the conclusion that they did not. Looking at the articles themselves, which were before us, it is difficult to suppose that anybody would call them paintings, in the popular and ordinary sense of the word. They were clearly not so. It is true they were painted, and painted with great care, by hand, and, as coloured or painted designs, were possessed of great merit and value. I look to the collocation of the words of the Carriers' Act, 'paintings, engravings, and pictures,' which to my mind indicates the intention of the Legislature that the word should receive its popular signification only. Interpreted generally, it would include a painted door or panel. It would be absurd to suppose that such was the meaning or intention of the Legislature. It is a matter of common knowledge that many beautiful and artistic designs for hangings, papers for walls, muslins, china, &c., representing animals, flowers, landscapes, &c., are so exquisitely drawn and painted that they may partake of the character of "paintings" in the popular sense in addition to their character as designs in a commercial sense. Whether they do so or not must always be a question for a Jury, subject, of course, to the control which the Court exercises over verdicts if they are manifestly wrong. That the articles in question are of a similar character to those in respect of which the Carriers' Act has afforded protection to carriers there can be no question, but, unfortunately, the language of the Act is not such as to include them, and the defect in the Act, if it be one, can only be remedied by the Legislature. It may be asked: How is one to tell whether that which is painted is a 'painting' or a mere painted design; where is the line to be drawn? Chief Baron Pollock said, in Brunt's case, 'The line is shifted according to the circumstances.' I think that this case is without the line, and that the Judgment must be against the Company." Baron Cleasby concurred.—*Tried in Court of Exchequer, January* 4, 16, *and February* 4, 1878.—*From Law Journal Reports, vol.* 47, *page* 263.

WHEN THE VALUE IS NOT DECLARED AND IT IS OVER £10, THE OWNER CANNOT RECOVER UP TO £10, NOR IN FACT ANY AMOUNT.

This conclusion naturally follows from the Carriers' Act. It is probable that many persons acquainted with the Act have appraised and claimed for lost or damaged goods (within the Carriers' Act) at less than £10 value, and have recovered same without question. It is therefore to the interest of the carrier that he should closely scrutinize the evidence of the value of goods for which claims under £10 may be made when such goods are articles within the Carriers' Act.

WHEN THE INCREASED VALUE OF THE GOODS IS WITHIN THE KNOWLEDGE OF THE CARRIER AND STILL THE SENDER REFUSES TO PAY THE EXTRA CHARGE.

	Case No.		Case No.
Wyld v. *Pickford* (1841)	82	*Robinson* v. *L. & S. W.*	751

DIGEST.

In *Wyld* v. *Pickford* (1841) Plaintiff delivered Pickford a case of maps, value £200, and refused to insure them. Pickford then served him with a notice as to conditions (special contract) upon which they carried the maps. The maps were misdelivered and damaged by wet, which it was held the conditions of the special contract covered, and the Judgment was therefore for Pickford.

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82. *Wyld* v. *Pickford & Co.*—Claim, £200, for the value of 1,000 maps enclosed in a case which became so injured in the Defendants' hands as to be wholly lost to Plaintiff—London to Athlone. The Defendants (Pickford & Co.) contended that at the time of the delivery of the case they gave notice to Plaintiff that they would not be responsible for the loss of or damage done to the maps unless same were insured according to their value, and paid for at the time of delivery; that they

accepted the case upon the conditions of the notice; that in spite of said notice the maps were not insured according to their value or paid for. It appeared there had been a misdelivery of the case.

The following legal conclusions were drawn from this case, viz.:—A carrier is bound to convey goods only on payment of the full price (which depends on their value) for the carriage, and, if not paid, it is competent to him to limit his liability by special contract. A carrier who receives valuable goods, after notice to the sender that he will not be responsible for loss or damage unless a higher than the ordinary rate of insurance is paid for the carriage of such goods, does so on the terms of such notice. He is, notwithstanding this notice, bound to take ordinary care in the conveyance, and is liable not only for a total abandonment of his character or wilful negligence, but also for a conversion by misdelivery which has arisen from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care; that in such case the burden of proof would lie on the Plaintiff.

Baron Parke said—"We agree, if the notice furnishes a defence, it must be either on the ground of fraud or of a limitation of liability by contract, which limitation it is competent to a carrier to make, because, being entitled by common law to insist upon the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry on the terms imposed by the common law, and insist upon his own." Judgment for carrier.—*Tried at Exchequer of Pleas, June* 10, 1841.—*From Law Journal Reports, vol.* 19, *page* 382, 1841. (This is a very strong case in support of the custom of two rates—one at owner's risk and one at Company's risk.)

WHERE ACCEPTANCE TO CARRY IS BY A CARTER WITH A COLLECTING CART AT SENDER'S PLACE OF BUSINESS.

	Case No.		Case No.
Clayton v. *Hunt* (1811)	72	*Hart* v. *Baxendale* (1851) ...	90
Davey v. *Mason* (1841)	83		

(*See under these cases.*)

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83. *Davey* v. *Mason.*—Action for £25 for a trunk, a box, and a small chest of luggage containing four silk dresses (made

up), two gold chains and glasses, two £5 notes, and various articles of a lady's wearing apparel—"Horse Shoe" Inn, Stones End, in the Borough, Southwark (London), to Lindfield (Sussex). The Plaintiff had been stopping at the "Horse Shoe" Inn, and sent to the "Talbot" Inn, in the Borough, where the carrier stopped and received his goods, for him to call at the "Horse Shoe" for the packages. He called and took the packages, and they were lost in transit, while the driver of the van was asleep. Plaintiff, by a female servant who helped to pack it, proved the contents of the trunk, except the bank notes, of the packing of which there was no evidence. The carrier (Defendant) contended, to prove a carrier liable, the goods should be left at the usual, proper, and recognised booking-office, and received there by some agent of the carrier; that by the Carriers' Act he was not liable for silk dresses, nor the gold chain and eye-glass (trinkets), the value and contents not having been declared. Chief Baron Lord Abinger said:—"Silk dresses made up for wear do not come within the meaning of the enactment that has been relied on, nor can a gold chain used for an eye-glass be considered as a trinket. The object of the Legislature no doubt was to protect carriers from liability where goods of great value were entrusted to them, and they did not have due notice of the amount of such value. With respect to the other point, it appears the Defendant's servant and van called for these things at the 'Horse Shoe' just as it is the custom for carriers to do. If you are satisfied that this luggage was delivered to the Defendant's servant, as has been proved, I am of opinion that the Defendant is just as much liable in this action as if he had taken up these goods at the 'Talbot' Inn instead of having taken them up at the 'Horse Shoe.'" Verdict, £25 damages.—*Tried in Court of Exchequer, Trinity Term*, 1841.—*Carrington and Marshman's Reports, Nisi Prius, vol.* 1, *page* 45.

IF THE VALUE IS DECLARED BUT NO EXTRA CHARGE IS MADE NOR DEMANDED, THEN THE CARRIER IS LIABLE FOR THE LOSS.

	Case No.		Case No.
Behrens v. *G. N.* (1861) ...	84	*Baxendale* v. *L. C. & D.* (1874)	85

DIGEST.

In *Behrens* v. *G. N.* (1861) a picture, value £110, was declared, but no insurance or extra charge was paid. It was held by the Exchequer Chamber that, the Plaintiff having declared the nature and value of the goods, and the Company not having then demanded an increased charge, the Company had waived their right to such increased charge. Judgment against Company.

In *Baxendale* v. *L. C. & D.* (1874) pictures, value £1000, London to Calais. At Dover the case was allowed to fall into the sea. The value had been declared, but from the report it would appear no insurance was paid. The Company, however, were held liable.

84. *Behrens* v. *Great Northern Railway Company.*—Action for £110 for a picture damaged, London to Newcastle. Plaintiff declared, on consignment note, the contents of the case, and also the value, but paid no insurance or extra charge. Company pleaded that, as no insurance or extra charge had been paid, they were not liable under Carriers' Act, 11 Geo. IV. and 1 William IV., cap. 68. The Jury found a verdict for £35. The Company appealed to Court of Exchequer, where it was held that, the Plaintiff having declared the nature and value of the goods, the Company's servants ought then to have demanded the increased rate of charge, but not having done so, it must be taken that the Company had waived such increased charge, and that the Plaintiff, although he had not paid nor engaged to pay the extra rate, was entitled to recover the full amount of the damage. A further appeal was taken to Exchequer Chamber, when the Judgment of Court of Exchequer

was affirmed.—*(Date tried not given; would be in* 1861.)—*Law Journal Reports, vol.* 31, *page* 301.

85. *Baxendale* v. *London Chatham and Dover Railway Company.*—Action for £1,000, value of two pictures damaged, and two sums of £248, taxed costs, and £266, untaxed costs of a law suit incidental to the damage of the pictures. The owner, Harding, delivered in London a case containing the two pictures to Pickford & Co. (Baxendale), consigned to Paris. Harding signed a "foreign declaration and consignment note," and described the contents of case as pictures, value £1,000. Pickford & Co. engaged the London Chatham and Dover Company to carry the case to their (Pickford & Co.'s) agents (Gardere & Co.) at Calais, and delivered a note describing the goods as a case of pictures, value £1000. It does not appear from the report that the Company demanded any extra charge for insurance. At Dover the case was allowed to drop into the salt water, and the pictures appear to have been utterly spoiled. Harding claimed from Pickford & Co. The Railway Company denied liability under the Carriers' Act, and would have nothing to do with the claim. Harding brought an action against Pickford & Co., who contended they did not undertake a through contract, and only received the case as forwarding agents, and their responsibility had ceased when the damage arose, and that they were protected by the Carriers' Act. The Jury gave a verdict for £650 against Pickford & Co. Whereupon Pickford & Co. then commenced an action against the Railway Company, who first contested the matter, but ultimately paid £650 into Court; but Pickford & Co., claiming to recover the costs, proceeded with the action at Kingston Assizes, and obtained a verdict for both bills of costs. The Company appealed to the Court of Exchequer, when Baron Cleasby held that Pickford & Co. were entitled to recover such an amount of costs as were attributable to establishing the liability of Pickford & Co. for the amount recovered against them, and with this guide the parties ought to settle the amount. The Company appealed to the Court of Exchequer Chamber, where Lord Chelmsford reversed the judgment of the Court of Exchequer, and held that the costs were irrecoverable. Judgment for

Company.—*Tried in Court of Exchequer Chamber, December 1 and 2, 1874.—From Law Journal Reports, vol. 44, page 20.*

IF THE PRIMARY OBJECT OF AN ARTICLE IS ORNAMENT, THEN IT IS A TRINKET.

(See the case of Bernstein v. Baxendale, No. 44.)

FORMAL DECLARATION NOT NECESSARY.

	Case No.
Bradbury v. *Sutton* (1871)	86

DIGEST.

In *Bradbury* v. *Sutton* (1871) the carrier's collector of parcels was in sender's warehouse, and saw the parcel of silk packed, and waited to take it away. In signing sender's book he inserted the word "silks" after the entry. Sender told him that the parcel in question and another he was taking were worth £100, and he said "All right." Chief Baron Kelly said—"The words used by the Plaintiffs in this case constituted, in my opinion, a sufficient declaration of value, because they supplied information on which the carrier could have calculated the additional charge to be made."

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86. *Bradbury* v. *Sutton.*—Action for £62 17s. 10d. for eleven pieces of silk, lost in transit, Macclesfield to London. One Birchaugh, the carrier's collector of parcels, was at sender's warehouse, and saw the parcel of silk packed, and waited while it was being packed to take it away. In signing sender's book for the parcel, Birchaugh himself inserted the word "silks" after the entry. Sender told him that the parcel in question and another he was taking were worth £100, and he said "All right."

Chief Baron Kelly, on the appeal case, said—"There can be no question that a sufficient declaration was made of the nature of these goods. The word 'silk' was written in the Plaintiffs'

book, as a description of these goods, by the Defendant's servant, and, with respect to the value of the goods, one of the Plaintiffs says that he told the servant that the goods were worth about £100. The other Plaintiff says that the words used were 'very nearly £100,' and the Jury have found that this evidence is true. What more was necessary? Many different forms of words would be used by different people, according to their education and habits, which might be equally valid as a declaration of value, for the statute does not prescribe any set form of words. Now, in determining the sufficiency of a declaration of value, it is material to consider what is the object of requiring such a declaration. That object is to enable the carrier to fix the amount of additional charge to be made by him. The words used by the Plaintiffs in this case constituted, in my opinion, a sufficient declaration of value, because they supplied information on which the carrier could have calculated the additional charge to be made. If the carrier had thought the information too indefinite he might have required more particularity." Baron Channel said—"It is suggested that what was said was mere small talk, but the word 'silk' was introduced into the entry in the Plaintiffs' books at their request; but it rather seems to me that the parties had the statute in their minds." Judgment against carrier.—*Tried in Court of Exchequer, May* 2, 1871.—*From Weekly Reporter, vol.* 19, *page* 800.

WHERE THE CHARACTER OF THE GOODS ARE VISIBLE AND TO BE SEEN, BUT THE VALUE NOT DECLARED.

	Case No.
Whaite v. *L. & Y.* (1874)	87

DIGEST.

In *Whaite* v. *L. & Y.* (1874) a showman's mechanical figures and pictures were damaged. The articles were packed in a waggon with wooden sides, but open at top. Plaintiff contended that, as the nature of the articles could be seen, a declaration was unnecessary. Baron Bramwell held—"Though the waggon was so packed

that the Company could see they were pictures of some sort, yet they could not say what pictures nor of what nature they were, their exact character being concealed by the mode of packing." Judgment for Company.

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87. *Whaite* v. *Lancashire and Yorkshire Railway Company.*—Action for £120 for damage to mechanical figures and pictures used by a showman. The articles were packed by sender in his waggon, and the waggon was carried on a railway truck in like manner as a furniture van is carried. The waggon had no top, but there were wooden sides—Wigan to Manchester, per passenger train. On the journey the figures and pictures were damaged, but the report does not say how. The Company contended that under the Carriers' Act they were not responsible for the pictures, their value collectively being over £10, and the value was not declared; that the contract was for a waggon, which was clearly "a parcel or package" within the Carriers' Act. Plaintiff contended that, as the nature of the articles could be seen, a declaration was unnecessary. The case was first tried by Baron Pollock at the Liverpool Assizes, 1873, when a verdict was entered for Plaintiff, £120. Leave was given to reduce to £20 if the Appeal Court should determine that the Company were protected by 1 William IV., cap. 68.

On the appeal case, Baron Bramwell said—"I think that this waggon, with what was in it, was a 'parcel or package' within the meaning of the Carriers' Act. Plaintiff's manager said, 'I *packed* these goods.' Then, if the goods were packed, this was a package. Though the waggon was so packed that the Company could see they were pictures of some sort, yet they could not say what pictures nor of what nature they were, their exact character being concealed by the mode of packing." Baron Cleasby and Baron Pollock concurred. Judgment for Company, reducing the verdict to £20.—*Tried before the Court of Exchequer, February* 11, 1874.—*From Law Journal Reports, vol.* 43, *page* 47.

CARRIERS' ACT, WHERE THE CARRIAGE OF THE GOODS IS PARTLY BY LAND AND PARTLY BY WATER.

	Case No.		Case No.
Pianciani v. *L. & S. W.* (1856)	470	*Baxendale* v. *G. E.* (1869) ...	66
Le Conteur v. *L. & S. W.* (1865)	479		

DIGEST.

In Powell's *Inland Carriers*, page 119, it is set forth as follows:—"It has been questioned, and appears to be still uncertain (1861), whether the Carriers' Act is limited to inland carriage in England, or whether it extends to a terminus beyond the realm, as to Jersey or Ireland. But where the terminus is beyond the realm it is clear that the carrier may limit his liability under the statute as to that portion of the transit which is within the realm (*Pianciani* v. *L. & S. W.*)

In *Pianciani* v. *L. & S. W.* (1856) passenger's luggage valued over £10, containing silks, furs, and laces, was lost, London to Jersey. The Court held that the contract was divisible—that is, for the land journey and the sea journey—and the Carriers' Act rendered the Company not liable.

In *Le Conteur* v. *L. & S. W.* (1865) a chronometer, which was part of a passenger's luggage, had been put into a carriage at Southampton Station and stolen therefrom. The passenger was travelling on a return ticket, London to Jersey and back. The Court held the same as in the case of *Pianciani* v. *L. & S. W.*, in favour of Company.

In *Baxendale* v. *G. E.* (1869) a case of pictures, value £84, was carried, Rotterdam to London, on a bill of lading, and no declaration was made of value. The case was lost on the land journey, Harwich to London. The Court held that the contract was divisible—that is, as for the land journey and the sea journey—and that the Company were protected by the Carriers' Act.

HORSES DECLARED AS ONLY £10 VALUE TO OBTAIN CHEAPER CARRIAGE, WHEREAS THEY WERE OF GREATER VALUE: THE CARRIER, IF HE KNOWS THE VALUE OF THE HORSE, CANNOT CHARGE INSURANCE ON THAT VALUE UNLESS SENDER MAKES THE DECLARATION OF IT.

	Case No.		Case No.
M'Cance v. *L. & N. W.* (1861) ...	740	*Robinson* v. *L. & S. W.* (1865) ...	751

DIGEST.

In *M'Cance* v. *L. & N. W.* (1861) two horses were injured and one killed from defective state of bottom of waggon. The horses were carried by the waggon, and sender declared them as not exceeding £10 value each, but on the trial said they cost from £30 to £35 each. He claimed £40. Chief Baron Pollock, on appeal, held that Plaintiff (sender) was bound by his declaration as to the value.

In *Robinson* v. *L. & S. W.* (1865) a mare was taken to Liss Station to go to London. The station-master, who worked the telegraph, saw a message from sender to consignee stating the cost of the mare as £135. He refused to forward the mare unless £4 5s. insurance was paid, in addition to 17s. 6d., the ordinary carriage. Chief Justice Erle held that the knowledge of the Company (station-master) as to the value of the mare not derived from a declaration by the sender gives no title to the Company to demand a higher insurance.

CARTING AGENTS' CARTER HELD TO BE THE COMPANY'S SERVANT, AND THE COMPANY HELD RESPONSIBLE FOR HIS THEFT OF GOODS OVER £10 VALUE UNDECLARED.

	Case No.
Machin v. *L. & S. W.* (1848)	88

DIGEST.

In *Machin* v. *L. & S. W.* (1848) the Company's carting agents' carter stole a bale of silk, value £150. Chief

Baron Pollock said—"Chaplin & Horne must be considered as the servants of the Company, and anybody whom Chaplin & Horne employed for the purpose of delivering these goods were also the servants of the Company; and it makes no difference that, by reason of some contract between the Company and Chaplin & Horne, the Company have not the power of dismissing such servants."

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88. *Machin* v. *London and South Western Railway Company.*—Action for £150 for a bale of silk, stolen by Company's carting agents' carter—Andover Road to London. On delivery at Andover the value was not declared as over £10, and the Company contended that the carter was not their servant, and consequently they were protected from liability under the Carriers' Act. The case was first tried before Chief Baron Pollock, at the London Sittings, when a verdict was found for Plaintiff. Leave was given to move to enter a verdict for the Company if the Court should think the carter was not the servant of the Company. On the appeal case, Chief Baron Pollock said—"The effect of the Carriers' Act was to give an indemnity to the Company as carriers from liability in case certain conditions had not been complied with, which liability was re-imposed by the 8th section in those cases only where the loss has been occasioned by the felonious act of *an actual servant of the Company.* What is written in the delivery note proves that the Company undertook to receive the bale of silk in the country and to deliver it from thence to the Plaintiff's residence; and it appears to me that, for the purpose of that delivery, the carter was in the employ of the Company within the meaning of the 8th section of 11 Geo. IV. and 1 Will. IV., cap. 68. It appears to me that the liability cannot be got rid of because those whom the carrier employs in carrying out his contract may bear the name of 'agents' or 'sub-contractors,' or any other fanciful title, for that every person who is actually employed in the performance of the contract which the carrier has undertaken to perform are his servants within the section. Chaplin & Horne must be considered as the servants of the Company, and anybody whom Chaplin

& Horne employed for the purpose of delivering these goods were also the servants of the Company; and it makes no difference that, by reason of some contract between the Company and Chaplin & Horne, the Company have not the power of dismissing such servants." Barons Rolfe and Platt concurred. Judgment against Company.—*Tried in the Court of Exchequer, June* 6 *and* 8, 1848.—*From Law Journal Reports, vol.* 17, *page* 271.

ACT OF DECLARATION OF VALUE OVER £10 TO ORIGINATE WITH SENDER.

	Case No.		Case No.
Batson v. *Donovan* (1820)	50	*Hart* v. *Baxendale* (1851)	90
Walker v. *Jackson* (1842)	89		

DIGEST.

In *Batson* v. *Donovan* (1820) Justice Holroyd said—"The value here does increase the risk; if that value is concealed, it is concealed wrongfully, then why is the carrier to be liable? The Plaintiff here concealed, and the carrier had not his due reward; the carrier was deprived of that which, according to this case, is the foundation of the carrier's liability, viz., a reward proportionate to the risk; and by not being apprised of what he received he was not put upon his guard to take what, with reference to this box, would have been proper care."

In *Walker* v. *Jackson* (1842) Baron Parke said—"I take it now to be perfectly well understood, according to the majority of opinions on the subject, that if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary. If he ask no questions, and there be no fraud to give the case a bad complexion on the delivery of the parcel, he is bound to carry the parcel as it is."

In *Hart* v. *Baxendale* (1851) Defendant's cart went to Plaintiff's warehouse to take up the goods, which were

silk over £10 value, and not declared. On appeal, Judge Patteson said—"We think the Act requires the person who sends the goods to take the first step by giving that information which he alone can give; then the carrier may charge an additional price, but he can only charge the price notified and in his office." Judgment for carrier.

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89. *Walker* v. *Jackson.*—Action for £10,000 for damage by salt water to boxes of watches and jewellery, Woodside Ferry to Liverpool. The boxes were under the seat of a carriage, and belonged to a Birmingham travelling jeweller. Both on the Woodside and Liverpool sides of the Mersey were slips. After unloading the carriage at Liverpool two of the Defendant's men were pulling the carriage up the slip incline, and it being too heavy for them, it ran back and was submerged in the water, and the damage occurred. Plaintiff recovered £211 damages. On the appeal case, Baron Parke said—"I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary. If he ask no questions, and there be no fraud to give the case a bad complexion on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions: if they are answered improperly, so as to deceive, then there is no contract between the parties; it is a fraud, which vitiates the contract altogether."—*Tried in Court of Exchequer, May* 31, 1842.—*From Meeson and Welsby's Reports, vol.* 10, *page* 161.

90. *Hart* v. *Baxendale* (*Pickford & Co.*)—Action for value of 12 pairs silk tights, 6 pairs silk hose, 2 Scotch fillibegs, 12 yards gilt fringe, &c. The package containing these goods was collected by cart from Plaintiff's warehouse at the Quadrant, Regent Street, London, by Defendant, and was to be carted to Camden Town Station for conveyance by railway. The cart, after leaving the warehouse, went to Defendant's office in Regent Street to complete the load, and

there, it is alleged, the package was stolen off the cart. The package was over £10 in value, but was not so declared by Plaintiff, who made no declaration whatever. The case was tried at the Middlesex Sittings, Trinity Term, 1850, before Chief Baron Pollock, who directed the Jury to find for Defendant, on the ground of the Carriers' Act, 1 Will. IV., cap. 68. An appeal was taken, when Baron Parke reversed the decision, saying that he and the other Judges (excepting Chief Baron Pigott) were of opinion that "the Carriers' Act does not exempt carriers from responsibility for loss of silk, &c., delivered to them at any other place than their office, warehouse, or receiving-house where a notice is affixed; and the goods in question having been delivered to the Defendant's servant in a cart at the Plaintiff's house without any special contract, the Defendant is responsible as a carrier at common law. The Defendant may elect within a reasonable time whether he will lodge a bill of exceptions."

This bill was lodged, and a writ of error brought thereon, when Judge Patteson said—"We think the Act requires the person who sends the goods to take the first step by giving that information which he alone can give; then the carrier may charge an additional price, but he can only charge the price notified and in his office, and he is bound, if required, to give a receipt when the money is paid. The declaration must be made in all cases, whether the goods are delivered at the office or elsewhere. In no case can the sender recover unless he has taken the step which the Legislature intended he should take in the first instance. The notice stuck up in the carrier's office required by section 2 is not a notice that the carrier means to avail himself of the benefit of the Act, and that all persons who send articles of a particular description and value shall tell him that they are of that description and value, but it is only a notice of what the extra charge is to be." This was practically a verdict for Defendant.—*Tried at Court of Exchequer*, 1851.—*Exchequer Reports, vol.* 6, *page* 769.

COMMON CARRIERS, SPECIAL CARRIERS,

AND

GRATUITOUS CARRIERS WITHOUT HIRE.

LIABILITY OF A CARRIER AS A "COMMON CARRIER."

(See also under "Where a Carrier may or may not Refuse to Carry.")

	Case No.		Case No.
Story on Bailments (sec. 494).		*Benett* v. *P. & .O* (1848)	469
Coggs v. *Bernard* (1703)	35	*Ingate* v. *Christie* (1850)	185
Forward v. *Pittard* (1785)... ...	187	*Crouch* v. *L. & N. W.* (1854) ...	380
Robinson v. *Dunmore* (1801) ...	192	*Munster* v. *South Eastern* (1858)	449
Brooke v. *Pickwick* (1827)	68	*Harrison* v. *L. B. & S. C.* (1862)...	99
Wilson v. *Brett* (1842)	259	*Liver Alkali Co.* v. *Johnson* (1874)	92
Ross v. *Hill* (1846)	91		

DIGEST.

Story on Bailments (sec. 494) says—"To bring a person within the description of a common carrier he must exercise it as a public employment. He must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation."

In *Coggs* v. *Bernard* (1703) Chief Justice Holt held—"If a carrier is to have a reward for his services he is bound to answer for the goods *at all events*. This is the case of the common carrier, common hoyman (bargeman), master of a ship—which case of master of a ship was first adjudged in *Mors* v. *Slew*. Thus the law charges the person entrusted to carry goods against *all events* but the acts of God and of the enemies of the King."

In *Forward* v. *Pittard* (1785) Lord Mansfield said—"It appears from all the cases for 100 years back that

there are events for which the carrier is liable *independent of his contract.* By the nature of his contract he is liable for all due care and diligence, and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm; that is, by the common law the carrier is in the nature of an *insurer.* It is laid down that he is liable for every accident except by the act of God or the King's enemies." (The Judge then goes on to define "the act of God.")

In *Robinson* v. *Dunmore* (1801), furniture conveyed by cart from London into the country was damaged by wet owing to the smallness of the tarpaulin. The carrier said—"I have plenty of sacks, and I will warrant the goods shall go safe." Justice Chambre held the Defendant liable, saying—"He is not a common carrier by trade, but he has put himself into the position of a common carrier by his particular warranty."

In *Brooke* v. *Pickwick* (1827) Chief Justice Best said—"If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and at the same time to place in his hands a printed paper specifying the precise extent of their engagement. If they omit to do this they attract customers under the confidence inspired by the extensive liability which the common law imposes on carriers, and then endeavour to elude that liability by some limitation which they have not been at the pains to make known to the individual who has trusted them. The merely putting up a board in their office ought not to satisfy a Jury that they have been at the pains to make a customer understand beforehand the limitation under which, after a loss, they seek to elude their general responsibility. I wish, therefore, that these notices had never been holden sufficient to limit the carrier's responsibility. It is too late, however, now not to hold that they are without effect where the customer is distinctly informed of their existence."

In *Ross* v. *Hill* (1846) a portmanteau was lost from a hackney coach between Paddington and Bridge Street, Southwark. Chief Justice Tindal—"If Defendant was a common carrier his duty would have been to carry and deliver safely, and at all events. The words 'safely and securely' therefore receive different interpretations with reference to the character in which the Defendant is charged. I can only infer that we are to construe these words 'safely and securely' with reference to the duty or the promise implied by the law from the particular position and relation of the parties, and not in the stricter sense contended for on the part of the Plaintiff." Judgment for coach proprietor.

In *Benett* v. *P. & O.* (1848) a passenger desired to travel by Defendants' steamers, Southampton to Gibraltar, and Defendants refused to carry him, owing to some communication made them by the Portuguese Consul. On appeal, Chief Justice Wilde said—"Can a man be a 'common carrier' of passengers from a place that is within the realm to a place out of it? I see no reason for holding that 'common carriers' must of necessity mean persons employed to carry within the realm and according to the custom." Judgment against P. & O. Company.

In *Ingate* v. *Christie* (1850) Baron Alderson said—"Everyone who undertakes to carry for anyone who asks him is a common carrier. The criterion is whether he carries for particular persons only or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him he is a common carrier; but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract. Here we have a person with a counting-house, 'Lighterman' painted at his door, and he offers to carry for everyone."

In *Crouch* v. *London and North Western* (January, 1854) Chief Justice Jervis said—"I think that the Company holding themselves out as common carriers in England, and professing to carry, London to Glasgow, they are

liable for refusing to accept goods for Glasgow. The Company are common carriers, and must adopt the same course of practice to all; and it being found in the case that it was their habit to carry packed parcels (tradesmen's enclosures) for everyone but the Plaintiff, they must act with the same justice to him as to the rest of the world."

In *Munster* v. *South Eastern* (1858) the Company refused to label and put in guard's van for a passenger bundles of rugs, shawls, and small packages, and Plaintiff (a barrister) insisted that they should do so. Chief Justice Cockburn said—"The Plaintiff objects to the parcels being placed in the carriage, on the ground that the Company are thereby endeavouring to relieve themselves from their liability as common carriers. There was nothing to relieve the Company of being common carriers, and the act of their porter in taking the parcels to the lost luggage office was a wrongful act, for which the Company are liable."

In *Harrison* v. *London Brighton and South Coast* (1862) Chief Justice Erle said—"The Company profess to carry dogs, and are, therefore, common carriers of dogs."

In *Liver Alkali Company* v. *Johnson* (1874) a barge loaded with salt cake got upon a shoal in the river Mersey in consequence of a fog, and the cake was damaged. The case turned upon whether Johnson was a special carrier or a common carrier. Justice Blackburn, on the appeal case, said—"He (Johnson) carried for anyone who chose to employ him, but an express agreement was always made as to each voyage or employment of the Defendant's flats. We think that this describes the ordinary employment of a lighterman, and that both on authority and principle a person who exercises this business is a common carrier, in the absence of something to limit his responsibility."

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91. *Ross* v. *Hill.*—Action for £20, the value of a portmanteau lost from a hackney coach between Great Western

Railway, Paddington, and Gerrard's Hall, Basing Lane, and Bridge Street, Southwark, London. Plaintiff contended that the proprietor of the coach was responsible to convey him and his luggage "safely and securely."

On the appeal case Chief Justice Tindal said—"If it had happened that the defendant was a common carrier his duty would have been to carry and deliver safely at all events without excuse, unless prevented by the act of God or King's enemies. If, on the other hand, he had been a mere gratuitous bailee, then a less degree of care and caution would have been required of him than is required from a bailee for reward. The words 'safely and securely' therefore receive different interpretations with reference to the character in which the Defendant is charged. I can only infer that we are to construe these words 'safely and securely' with reference to the duty or the promise implied by law from the particular position and relation of the parties, and not in the stricter sense contended for on the part of the Plaintiff. We cannot suppose it to have been an express contract to carry 'safely and securely.'" Judgment for coach proprietor.—*Tried in Court of Common Pleas, April* 30, 1846.—*From Manning and Granger's Common Bench Reports, vol.* 2, *page* 877.

92. *Liver Alkali Company* v. *Johnson.*—Action for damage to salt cake, carried in a barge from Widnes to Liverpool on the river Mersey. The goods were injured by reason of the barge getting on a shoal in consequence of a fog. This was a peril of navigation, but could in no sense be called the act of God or of the Queen's enemies. On the first trial the Jury found there was no negligence on the part of the Defendant.

Justice Blackburn, on the appeal case, said—"The question raised is, whether the Defendant was under the liability of a bailee for hire, namely, to take proper care of the goods, in which case he is not responsible for this loss; or whether he has the more extended liability of a common carrier, namely, to carry the goods safe against all events but acts of God and the enemies of the Queen. The Defendant was the owner of several flats, and he made it his business to send out his flats, under the care of his own servants, to carry cargoes to and

from places on the Mersey, but that it always was to carry goods for one person at a time. 'He carried for any one who chose to employ him, but an express agreement was always made as to each voyage or employment of the Defendant's flats,' which means, as we understand the evidence, that the flats did not go about plying for hire, but were waiting for hire by anyone. We think that this describes the ordinary employment of a lighterman, and that both on authority and principle a person who exercises this business and employment does, in the absence of something to limit his liability, incur the liability of a common carrier in respect of the goods he carries. It was argued before us that the Defendant could not have this liability unless he held himself out as plying between two particular places, or had put his flat like a ship to go to some particular place and take all goods brought him for that voyage. In *Lyon* v. *Mells*, the course of business of the Defendant is thus described:—

"'The Defendant keeps sloops for carrying for persons goods for hire, and also lighters for the purpose of carrying these goods to and from his sloops; and when he had not employment for his lighters in his own business, he let them for hire to such persons as wanted to carry goods to other sloops.'

"If there be any difference between the employment of the now Defendant, as described in this case, and the employment of the Defendant in *Lyon* v. *Mells*, it would seem that the latter was less clearly in public employment.

"We think, therefore, that the Judgment in the Court below was right, and should be affirmed." Justices Mellor, Archbald, and Grove concurred. Justice Brett dissented. Judgment against the carrier.—*Tried in the Court of Exchequer Chamber, June* 26, 1874.—*From Law Reports, Exchequer, vol.* 9, *page* 338.

LIABILITY OF A CARRIER AS A "SPECIAL CARRIER."

	Case No.
17 & 18 *Vic., cap.* 31, *sec.* 7.	
Powell's Inland Carriers (*Quotation*).	
Gibbon v. *Paynton* (1769)	93
Crofts v. *Waterhouse* (1825) ...	94
Brind v. *Dale* (1837)	95
Wyld v. *Pickford* (1841)	82
Oxlade v. *N. E.* (1864)	279
Northampton Gas v. *London and North Western* (1868)	770
N. E. v. *Richardson* (1871) ...	100
Scaife v. *Farrant* (1875)	190

DIGEST.

CARRIER EMPOWERED TO MAKE A SPECIAL CONTRACT (WHEREBY HE BECOMES A SPECIAL CARRIER) WITH HIS CUSTOMER, WHICH A JUDGE SUBSEQUENTLY MAY HOLD TO HAVE BEEN "JUST AND REASONABLE."

17 & 18 *Vic., cap.* 31, *sec.* 7.—Provided always that nothing herein contained shall be construed to prevent the said Companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be "just and reasonable."

In Powell's *Law of Inland Carriers*, he quotes *Great Northern* v. *Morville*, and says—"But there must be *regularity* and *permanency* in the occupation, and when the existence of these elements is questionable, it must be left as a fact for a Jury to determine, and according to their finding the bailee will have the unlimited liabilities of a common carrier or the comparative immunities of a special carrier for hire."

In *Gibbon* v. *Paynton* (1769) Lord Mansfield said—"There is a difference between a common carrier and that of a bailee (special carrier). The latter is only obliged to keep the goods with as much diligence and caution as he would keep his own; but a common carrier, in respect of the *premium* he is to receive, runs the risk of them and must make good the loss, though it happen without any fault in him—the reward making him answerable for their safe delivery."

In *Crofts* v. *Waterhouse* (1825) Justice Parke said—"There is a wide distinction between contracts for the conveyance of passengers and those for the conveyance

of goods. In the latter, the parties are liable *at all events*, except the goods are destroyed or damaged by the act of God or the King's enemies, whilst in the former they are only responsible to their passengers in cases of *express negligence*. The question of negligence should certainly have been left to the Jury."

In *Brind* v. *Dale* (1837) Defendant was a town carman keeping thirty or forty carts. One of his carts was taken off a public stand in Thames Street to cart furniture, and one package of furniture was lost. Lord Chief Baron Abinger said—"I think the Defendant is not a common carrier, and does not insure the safety of the goods *at all events*. I should say that this was a contract to carry 'safely and securely' as far as regards the neglect of himself or his servant."

In *Wyld* v. *Pickford* (1841) maps, value £1,000, being articles named in Carriers' Act, were offered to Defendant, who demanded an increased charge to cover the insurance risk; this Plaintiff refused to pay. The Court held—"A carrier is bound to convey goods only on payment of the full price (which depends on their value) for the carriage, and if not paid, it is competent to him to limit his liability by special contract."

In *Oxlade* v. *North Eastern* (June, 1864) the Company declined to carry coal for individuals, and confined the carriage to colliery owners. Chief Justice Erle said —"I think the Company have a perfect right to say that they will carry coal only for colliery owners. For the reasons alleged by them in their affidavits, it is evident that they could not have the same control over the traffic if they carried coals for the general public."

In *Northampton Gas* v. *London and North Western* (1868) the axle of an owner's waggon broke, and the coal was lost. The Court held—"The Company convey coal in their own trucks only, upon special agreement and at their own discretion, for particular parties. The Company has a distinct statutory power

to convey goods in vehicles provided by the consignee or sender concurrent with and distinct from the power to carry on their own account. The fact that the Railway Company on some occasions took charge of goods in a vehicle not provided by them would of itself exempt them on those occasions from the ordinary liability of a *common carrier* for the sufficiency of the vehicle. I have come to the conclusion, from all the facts, that the Company are not *common carriers* of coal. The Company have the right to decline to be common carriers of any particular class of goods, although they are common carriers of others." *(See Johnson* v. *Midland.)*

In *North Eastern* v. *Richardson* (1871) a dog tied to a spout on Kirby Stephen Station slipped its collar and was killed. Justice Willes said—"The Company in the present case, with reference to the dog in question, were in the position of ordinary bailees, not being common carriers of dogs, and only liable for the loss in the event of negligence on their part, and would not be liable if its loss was by reason of negligence of the person who delivered the dog to the Company."

In *Scaife* v. *Farrant* (1875) the defendant was a carrier owning furniture vans, and he contracted to carry some furniture from Paignton to Plymouth, using the railway for part of the journey. The furniture was destroyed by fire during transit. Plaintiff signed a special contract. Justice Lush held that there was no negligence, that the fire was accidental, that there was a special contract, and that the carrier was not liable, being a special carrier and not a common carrier.

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93. *Gibbon* v. *Paynton.*—Action for loss of £100 cash, hid in hay in an old nail bag, and delivered without declaration, so as to evade the extra cost of insurance of 3d. in the pound sterling—Birmingham to London.

Lord Mansfield, on appeal, said—"There is a difference between a common carrier and that of a bailee (special carrier).

The latter is only obliged to keep the goods with as much diligence and caution as he would keep his own; but a common carrier, in respect of the *premium* he is to receive, runs the risk of them and must make good the loss, though it happen without any fault in him—the reward making him answerable for their safe delivery. This action is brought against the Defendant upon the foot of being a common carrier. His warranty and insurance is in respect of the *reward* he is to receive, and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance he will take greater care, use more caution, and be at the expense of more guards or other methods of security, and therefore he ought in justice to have a greater reward. Consequently, if the owner of the goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier. And here the owner was guilty of a fraud upon him; the proof of it is abundant. The Plaintiff is a dealer in Birmingham. The price of the carriage of money from thence is notorious in that place; it is the rule of every carrier there. It is fairly presumed that a man conversant in a trade knows the terms of it. Therefore the Jury were in the right in presuming that this man knew it. The advertisement and hand-bills were circumstances proper to be left to the Jury. The Plaintiff's having been used for a year and a-half to read this newspaper is a strong circumstance for the Jury to ground a presumption that he knew of the advertisement. Then his own letter strongly infers his consciousness of his own fraud, and that he meant to *cheat* the carrier of his hire. If he has been guilty of a fraud how can he recover? *Ex dolo malo non oritur actio.*" Justices Yates and Aston concurred. Judgment for carrier.—*Tried in Court of King's Bench, April* 17, 1769. —*From Burrows' Reports, vol.* 4, *page* 2299.

94. *Crofts* v. *Waterhouse.*—Action for being greatly bruised, wounded, and hurt by being pitched off the top of a coach which was overturned on the journey, London to Exeter. It was held that the proprietor of a stage-coach is not liable for an injury sustained by a passenger in consequence of the accidental overturning of the coach, unless such accident be occasioned by the negligence or misconduct of the

driver. Therefore, where in an action for an injury of this description it appeared that the cause of the accident was the removal (since the coach had last passed) of one or two cottages that had previously stood on an angle of the road, by which means the driver was deceived as to the course of the road (it being night, though moonlight), and the Judge told the Jury that, as the road was of sufficient width, and there was no obstruction or want of light, the coachman ought to have kept within his limits, and a verdict of £100 was found for the Plaintiff, on the appeal case the Court granted a new trial, conceiving that it should have been left to the Jury to say whether or not the driver had been guilty of negligence. Justice Parke said—"There is a wide distinction between contracts for the conveyance of passengers and those for the conveyance of goods. In the latter, the parties are liable *at all events*, except the goods are destroyed or damaged by the act of God or the King's enemies; whilst in the former they are only responsible to their passengers in cases of *express negligence*. The question of negligence should certainly be left to the Jury." Judgment for carrier.—*Tried in Court of Common Pleas, November* 26, 1825.—*From Moore's Reports, vol.* 2, *page* 133.

95. *Brind* v. *Dale.*—Action for the loss of a package of furniture or luggage. Plaintiff required some packages removed from Nicholson's Wharf to Brook's Wharf, in London. About 6 p.m. he went to a stand of carts in Thames Street, at which a cart of Defendant's was plying for hire. It also appeared Plaintiff was an owner of thirty or forty carts which were in the habit of standing near the wharfs ready to be hired by any person who chose to engage them, either by the hour, day, or job, the Defendant being what is called a town carman.

Lord Chief Baron Abinger said—"I think the Defendant is not a common carrier. Still, if I were to allow the Defendant to amend the declaration by stating that the Defendant for hire agreed to convey these goods, he would then be liable for the loss of them, if it occurred from the negligence of his own servants. I should say that this was a contract by the Defendant to carry safely and securely, as far as regards the neglect

of himself and his servant, but not to insure the safety of the goods at all events." Judgment for carrier.—*Tried at Nisi Prius, Michaelmas Term,* 1837.—*From Carrington and Payne's Reports, vol.* 8, *page* 207.

LIABILITY OF A CARRIER AS A "GRATUITOUS CARRIER" WITHOUT HIRE.

	Case No.		Case No.
Nelson v. *Mackintosh* (1816) ...	96	*Aldridge* v. *Great Western* (1864)	14
Beachamp v. *Powley* (1831)... ...	97		

DIGEST.

In *Nelson* v. *Mackintosh* (1816) Plaintiff was to work his passage, Trinidad to London, but missed his passage, and left his chest of doubloons and dollars on board. The captain of the ship took the valuables out of the chest in presence of several passengers, and placed them in a canvas bag in his own chest in his cabin. After arrival of the ship in London, the captain's chest and the valuables were stolen out of the cabin. Lord Ellenborough left it to the Jury—Whether the captain had not, under the circumstances, by the intermeddling and removal, imposed on himself the duty of carefully guarding against all perils to which the property was exposed in consequence of the alteration? Verdict against captain.

In *Beachamp* v. *Powley* (1831) a driver of a coach was given a value parcel to carry to London as a private messenger, not as the agent of his master; the coachman was not to receive any pay for the conveyance. The parcel was lost. Lord Tenterden told the Jury—"It was the coachman's duty, having received it, to take care of it and deliver it as addressed; and if there was great and somewhat extraordinary negligence on his part, the verdict ought to go against him." Verdict against the coachman.

In *Aldridge* v. *Great Western* (1864) it was a case where empty fruit hampers, Hereford to Tiverton, had been carried free. The Company's terminus was Gloucester, and the hampers were lost on the Midland Railway between Gloucester and Bristol. A carrier,

Smith, who signed the Company's conditions, was held to be an agent for both sender and consignee. Chief Justice Erle held it was not a through contract, saying—"To stipulate that under these circumstances they shall not be responsible for loss or delay on the further line seems to us just and reasonable."

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96. *Nelson* v. *Mackintosh*.—Action for the value of a chest containing doubloons, dollars, and other valuables, Trinidad to London. Plaintiff went on board the "Arundel" with his chest, and was going to work his passage to London. Being casually on shore at the time when the convoy made signal for sailing, he was left behind. The Plaintiff's box was examined by the captain of the ship, and found to contain valuables, and was then nailed down and remained on the quarter deck. Towards the termination of the voyage, the captain, in the presence of several passengers, took the valuables out of the chest, put them into a canvas bag, and deposited it in his own chest in his cabin. At Gravesend the captain left the ship, and left the mate in charge; an exciseman and two of the ship's crew were allowed to sleep in the cabin. Next morning the captain's trunk and the valuables were gone, and no one knew how.

Lord Ellenborough said—"Every person who delivers goods to another to be carried for hire has a right to the utmost care. The carrier stands in the situation of an insurer, and is liable for all losses except those which are occasioned by the act of God or of the King's enemies; and where a person does not carry for hire, he is bound to take proper and prudent care of that which is committed to him. Such would have been the situation of the parties if no alteration had been made in the state of the box, but when the captain, from motives of prudence, opened the box, he was bound to intermeddle so as to replace it in its former place, state of security, and to restore all the guards with which it had before been protected. In this case the captain, by his conduct, exposed the property to peril and risk, and the value of the property imposed upon him an enhanced duty of vigilance, that his acts might not operate to the prejudice of the party. When he had ascertained the valuable nature of the property, it was a duty imperative upon him to restore it to at least its former degree of security. Now

what was done in this case? As they approached the land the property was taken out of the box and put into a canvas bag. When the Defendant had taken it wholly out of the box, he was bound to make his own trunk, in which it was deposited, as secure as possible. It was no longer the box of a seaman working his passage home, but ascertained to be an article of great value, which the Defendant was therefore bound to watch with great care and diligence. He left the Jury to say—

1. Whether the captain had not, under the circumstances, by the intermeddling and removal, imposed on himself the duty of carefully guarding against all perils to which the property was exposed in consequence of the alteration?

2. Whether he had in fact carefully guarded the property? and that, if they were of opinion that the conduct of the Defendant had imposed upon him the duty of carefully guarding the goods, and that he had been guilty of negligence, they were to find for the Plaintiff. Verdict for Plaintiff.—*Tried at Nisi Prius, Hilary Term*, 1816.—*From Starkie's Reports, vol.* 1, *page* 227.

97. *Beachamp* v. *Powley.*—Action for a parcel of value lost, sent by coach, Bedford to London. A servant of one of the owners of the coach had been used as a messenger to give to the coachman the parcel. It was delivered to the coachman on the road, and was neither booked nor any charge made for carriage. Plaintiff therefore, having no claim against the coach owners, sued the coachman. The coachman could not recollect what became of the parcel.

Lord Tenterden said—"The question for the Jury will be whether there was gross negligence on the part of the coachman (Defendant). Nothing was to be paid for its conveyance, but still, if the coachman received it, it was his duty to take care of it and deliver it at the coach office in London to which it was addressed. The parcel was of value, and known to him to be so, and it being his duty to deliver it, the Jury are to say whether there was great negligence on the part of the Defendant; if there was not great and somewhat extraordinary negligence on his part, the verdict ought to be for him." Verdict against the coachman.—*Tried at Nisi Prius, Feb.* 3, 1831.—*From Moody and Robinson's Reports, vol.* 1, *page* 38.

SPECIAL CONTRACT

CONTRASTED WITH

COMMON CARRIERS' LIABILITY.

SPECIAL CONTRACTS.

RAILWAY AND CANAL TRAFFIC ACT, 1854,

17 & 18 *Vic., cap.* 31, *sec.* 7.

PUBLIC NOTICES LIMITING LIABILITY ILLEGAL.

Every such Company as aforesaid shall be liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivery thereof occasioned by the neglect or default of such Company or its servants, notwithstanding any notice, condition, or declaration made and given by such Company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void.

CARRIER EMPOWERED TO MAKE A SPECIAL CONTRACT WITH HIS CUSTOMER, WHICH A JUDGE SUBSEQUENTLY MAY HOLD TO HAVE BEEN "JUST AND REASONABLE."

Provided always that nothing herein contained shall be construed to prevent the said Companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be "just and reasonable."

LIMIT OF MONEY DAMAGES FOR CATTLE WHEN VALUE IS UNDECLARED.

Provided always that no greater damages shall be recovered for the loss of, or for any injury done to, any of such animals beyond the sums hereinafter mentioned, that is to say, for any horse £50, for any neat cattle per head £15, for any sheep or pigs per head £2, unless the person sending or delivering the same to such Company shall, at the time of such delivering, have declared them to be respectively of higher value than as above mentioned.

POWER FOR COMPANY TO CHARGE EXTRA WHEN VALUE IS DECLARED.

In which case it shall be lawful for such Company to demand and receive, by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. IV. and 1 Will. IV., cap. 68, and shall be binding upon such Company in the manner therein mentioned.

PROOF OF THE VALUE OF CATTLE, ARTICLES, AND GOODS RESTS WITH OWNER.

Provided also that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury.

THE SPECIAL CONTRACT NOTE FOR CARRIAGE AT "OWNER'S RISK" MUST BE SIGNED BY OWNER OR HIS SERVANT WHO DELIVERS TRAFFIC.

Provided also that no special contract between such Company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things aforesaid shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage.

THIS ACT DOES NOT AFFECT THE CARRIERS' ACT WHERE, IF GOODS ARE IN VALUE OVER £10, A DECLARATION OF SAME IS COMPULSORY TO ENABLE OWNER TO RECOVER ANYTHING FOR THEIR LOSS.

Provided also that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such Company under the said Act of the 11 Geo. IV. and 1 Will. IV., cap. 68, with respect to articles of the descriptions mentioned in the said Act.

1 & 2 *Will. IV., cap.* 58, *sec.* 1, *relating to Interpleader Proceedings.*—Whereas it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims by a suit in equity against the Plaintiff and such third party, usually called a Bill of Interpleader, which is attended with expense and delay for remedy thereof, be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same,—That upon application made by or on the behalf of the Defendant, sued in any of His Majesty's Courts of Law at Westminster, or in the Court of Common Pleas of the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration and before plea, by affidavit or otherwise, showing that such Defendant does not claim any interest in the subject matter of the suit, but that the right thereof is claimed or supposed to belong to some third party, who has sued or is expected to sue for the same, and that such Defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject matter of the action in such manner as the Court (or any Judge thereof) may order or direct, it shall be lawful for the Court, or any Judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations, as well of such third party as of the Plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself Defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be

Plaintiff or Defendant on such trial, or, with the consent of the Plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable.

23 & 24 *Vic., cap.* 126, *sec.* 12, *relating to Interpleader Proceedings.*—Where an action has been commenced in respect of a common law claim for the recovery of money or goods, or where goods or chattels have been taken or are intended to be taken in execution under process issued from one of the Superior Courts, or from the Court of Common Pleas at Lancaster, or the Court of Pleas at Durham, and the Defendant in such action, or the Sheriff or other officer, has applied for relief under the provisions of an Act made and passed in the Session of Parliament held in the first and second year of the reign of His late Majesty William the Fourth, intituled *An Act to enable Courts of Law to give relief against adverse claims made upon persons having no interest in the subject of such claims*, it shall be lawful for the Court or Judge to whom such application is made to exercise all the powers and authorities given to them by this Act and the hereinbefore-mentioned Act passed in the Session of Parliament held in the first and second years of the reign of His late Majesty William the Fourth, though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another.

Carrier's Liability in respect to Supplying Safe Vehicles fit for the Conveyance.

	Case No.		Case No.
Lyon v. *Mells* (1804)	174	*M'Cance* v. *L. & N. W.* (1861) ...	740
Smith v. *Horne* (1818)	67	*Gregory* v. *West Mid.* (1864) ...	699
Beckford v. *Crutwell* (1832)	183	*Moffat* v. *G. W.* (1867)	742
Shaw v. *Y. & N. Mid.* (1849) ...	736	*Northampton Gas* v. *L. & N. W.* (1868)	770
Austin v. *M. S. & L.* (1851) ...	737	*Combe* v. *L. & S. W.* (1874) ...	749
Chippendale v. *L. & Y.* (1851) ...	698		
M'Manus v. *L. & Y.* (1859) ...	739		

DIGEST.

In *Lyon* v. *Mells* (1804) bales of yarn were damaged in a lighter from leakage. Lord Ellenborough said—"In every contract for the carriage of goods it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that the vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very founda-

tion and immediate substratum of the contract that it is so."

In *Smith* v. *Horne* (1818) a parcel had been safely carried from Worcester to London, but in the course of delivery was stolen from the cart. There was only one man with the cart, when it was usual to send two. It was held to be gross negligence in not sending two carters; and Justice Parke said—"A case of grosser negligence than this I have hardly ever known." Although the value was £67, and had not been declared, the carrier was held liable.

In *Beckford* v. *Crutwell* (1832) a picture was not safely carried between London and Bath by carrier's waggon. Lord Tenterden left it to the Jury, who found gross negligence in that the carrier sent a waggon off with seven horses and only one waggoner, and that such conduct was not taking reasonable care.

In *Shaw* v. *Y. and N. Mid.* (1849) a horse was killed in a horse-box owing to a defective partition. Special contract was admitted. Lord Chief Justice Denman, in giving Judgment for Company, said—"It may be that, notwithstanding the terms of the contract, the Plaintiff might have alleged that it was the duty of the Company to have furnished proper and sufficient carriages, and that the loss happened from a breach of that duty; but the Plaintiff has not so declared (in his plea), but has alleged a duty (*i.e.*, to carry safely and securely) which does not arise upon the special contract as it appeared in evidence."

In *Chippendale* v. *Lancashire and Yorkshire* (1851) for loss of three heifers that got out of a truck in transit between the top rail of the truck and the close boarding, special contract note was signed. Justice Coleridge held the Company not liable, saying that Plaintiff had a full opportunity of knowing what the truck was, for it was found that he saw one of the beasts put into it.

In *Austin* v. *Manchester Sheffield and Lincoln* (1851) seven horses were injured from the truck, owing to a

hot axle, being thrown out of position on the train. A special contract was signed. During stoppage at a station, Plaintiff requested that the horses should be taken out of the truck owing to the hot axle. This was not done. Judge Patteson, on appeal, said—"The gist of the complaint is not simply breach of the ordinary duty of a common carrier, nor of that arising on the special contract, *but negligence* in persisting to go on with the insufficient truck after notice and request. But I cannot agree to this. The breach must arise by virtue of *contract* or *duty*." Judgment for Company.

In *M'Manus* v. *Lancashire and Yorkshire* (1859) three horses were injured from a hole being made during transit in the bottom of the cattle truck. Special contract note was signed. Justice Williams, in Exchequer Chamber, held that the Company were responsible to supply a sufficient and proper vehicle, and any contract seeking to exempt them from so doing was unreasonable. Judgment against Company.

In *M'Cance* v. *London and North Western* (1861) two horses were injured, and one died from injury resulting solely from the defective state of the bottom of the waggon. There was a special contract proved. The Company were held liable on the footing that the horses were worth £10 each, as declared by sender. The case of *M'Manus* v. *Lancashire and Yorkshire* ruled this decision.

In *Gregory* v. *West Midland* (1864) a cow got out of a waggon in transit, and was lost to the owner. It was admitted that the truck was not a proper truck, but there was a special contract, and a condition that the owner should examine the truck before his cattle were put into it. The Court of Exchequer felt bound to give judgment against the Company, following the decision of *M'Manus* v. *Lancashire and Yorkshire*, but the Judges considered that otherwise the special conditions should have exempted the Company from liability.

In *Moffatt* v. *Great Western* (1867) a mare, after being loaded at High Wycombe Station into a horse-box,

got her foot into the manger; she then slipped, and was strangled before the head rope could be cut. She was tied with two head ropes, one two feet and the other three feet long. It was contended that the Company's ropes should have only been 18 inches long. The Jury gave a verdict against the Company, although the opinion of Judge Keating appeared to be in favour of the Company.

In *Northampton Gas* v. *London and North Western* (1868) the axle of an owner's waggon broke, and the coal was lost. The Judge said—"The fact that the Railway Company upon some occasions took charge of goods in a vehicle not provided by them, but by the sender or consignee, would of itself exempt them from the ordinary liability of a *common carrier* for the sufficiency of the vehicle. I consider the Company liable for an accident arising from a defect in any of the vehicles provided by other parties which could have been discovered by the Company, upon inspection at one of the usual points on the line, before the accident happened."

In *Combe* v. *London and South Western* (1874) a colt broke its leg in a space of three inches, exposed when the flap of the waggon was let down for the mare and colt to be unloaded. The Jury found the truck defective, and Justice Keating, on appeal, confirmed the verdict against the Company.

CARRIERS' SERVANTS CANNOT ALTER THEIR EMPLOYERS' PUBLISHED CONDITIONS OF CARRIAGE, NOR BIND THEIR EMPLOYERS BEYOND THE SCOPE OF THEIR OFFICIAL DUTIES.

	Case No.		Case No.
Walker v. *Y. & N. Mid.* (1853) ...	145	*Slim* v. *G. N.* (1854)	718
Giles v. *Taff Vale* (1853) ...	211	*Willis* v. *G. W.* (1865)	720
Anderson v. *C. & H.* (1853) ...	730	*Finlay* v. *N. B.* (1870)	150

DIGEST.

In *Walker* v. *Y. & N. Mid.* (1853) fish arrived too late for market. The Company had served sender with a

special notice, which the Court treated as forming a special contract. Part of the notice set forth—"The station clerks and servants of the Company have no authority to alter or vary these conditions." Sender saw the station-master at Scarborough, and said, "What is the use of sending that old fellow down to serve these notices? they are of no use whatever;" and he added that it was not binding on him. Chief Justice Campbell said—"A person who has notice of the limited authority of an agent must be bound by such limited authority, and be supposed to have acted upon it. What sender says to a person who has no authority to alter the terms of the notice in any way is immaterial."

In *Anderson* v. *C. & H.* (1853) horses, Dublin to Shrewsbury, for a fair, missed the fair. Plaintiff swore the Company's clerk in Dublin made a special contract binding the Company to have the horses in time for the fair. The Chief Justice, in charging the Jury, decided, as a point of law, that Thomas Jones, the clerk placed in the position in the Company's office, taking money from the public for carriage of goods and cattle, had inferentially authority to bind the Company by such a special contract. Judgment, on appeal, was against the Company.

In *Giles* v. *Taff Vale* (1853) the Exchequer Chamber unanimously held that it is the duty of a Company carrying on trade to have on the spot an officer with authority to do for the Company all that in the ordinary exigencies of their business might require to be done promptly; that in this respect there is no difference between an ordinary partnership and a corporation; that there was sufficient evidence that Fisher (manager) had authority to this extent from the Company, and that it was not necessary to show any authority under seal.

In *Slim* v. *Great Northern* (1854) six pigs were lost between the town and Company's receiving station. The Company alleged their cattle porter, Morgan,

never got them. Judgment was for Company. Justice Cresswell said—"I am of the same opinion, both on the ground that there was no evidence of any authority to Morgan to bind the Company without the usual documents, and also that it did not appear that he held himself out as having such authority."

In *Willis* v. *Great Western* (1865) there was a delay to cattle. Plaintiff was allowed to state a conversation he had a week after the delay with a Company's servant, who admitted he forgot to send the cattle on. Held—The Company's servant has no implied authority to bind the Company by such admission.

In *Finlay* v. *North British* (1870) Plaintiff contended he made a special contract with one of the Company's checkers, irrespective of the general agreement (owner's risk), and that the general agreement he had made was unjust, unreasonable, and illegal. Lord Kinloch held that the Plaintiff had proved a special contract with the Company's servant that the fish would be sent by a certain train. The majority of the Court, however, held Plaintiff bound by the owner's risk rate contract.

Special Conditions where a Delay or Loss of Market arises.

(*See Loss of Market under "Delay where no Special Contract was made."*)

	Case No.		Case No.
Streeter v. *Horlock* (1822)	16	*Allday* v. *Great Western* (1864)	683
Walker v. *Y. & N. M.* (1853) ...	145	*Robinson* v. *Great Western* (1866)	732
Anderson v. *C. & H.* (1853) ...	730	*Lord* v. *Midland* (1867)	149
Hughes v. *Great Western* (1854)	676	*Kirby* v. *Great Western* (1868) ...	688
Crisp & Thompson v. *Y. N. & B.* (1854)	675	*Finlay* v. *North British* (1870) ...	150
Snead v. *S. & H.* (1855)	677	*Gallagher* v. *Great Western* (1874)	163
White v. *Great Western* (1857) ...	147	*Simpson* v. *L. & N. W.* (1876) ...	151
Wren v. *Eastern Counties* (1859)	157	*Ruddy* v. *Mid. G. W.* (1880) ...	695
Beal v. *S. D.* (1860)	148	*Gordon* v. *Great Western* (1881)	697

DIGEST.

In *Streeter* v. *Horlock* (1822) a carrier undertook to deliver fifty quarters wheat to a mill before nine

o'clock on a Saturday, by barge, and failed to do so. Justice Park said—"Where an order is given previously to the delivery of the goods to a carrier to deal with them when delivered (to carrier) in a particular manner, to which he assents, and afterwards the goods are accordingly delivered to him, a duty arises on his part upon receipt of the goods to deal with them according to the order previously given and assented to, and the law infers an implied promise by him to perform such duty."

In *Anderson* v. *Chester and Holyhead* (1853) horses, Dublin to Shrewsbury, were late for a fair. It was held that the Company's clerk in Dublin had guaranteed that the horses should arrive in time for the fair; and as the second count was given in favour of the Company on the special contract, it may be inferred, but for the clerk's guarantee, the decision would have been in favour of the Company. In fact, the clerk's guarantee superseded the special contract.

In *Walker* v. *Y. & N. M.* (1853) fish for Manchester arrived too late for the market, and a special notice served on sender was held at that time, 1853, to be sufficient to exempt the Company from liability, and to constitute a special contract.

In *Crisp & Thompson* v. *Y. N. & B.* (1854) sender booked and paid carriage for the cattle, with a notice constituting a special contract on the ticket. The cattle were delayed for want of trucks, and the cattle missed Newcastle market. The Chief Justice, on the appeal, held that there was no evidence for the County Court Jury to decide the Company were common carriers, and that the County Court Judge wrongly gave the Jury an opportunity of deciding against the Company contrary to the law. Judgment was then given for the Company.

In *Hughes* v. *Great Western* (1854) pigs arrived too late for Birmingham Thursday's market. Sender signed special contract with condition that "The Company is not to be held responsible for the carriage or

delivery within any certain or definite time, nor in time for any particular market." The Common Pleas confirmed the non-suit, holding that the Judge (in Court below) ought to have told the Jury to find for the Company on the plea setting up the contract, and it was quite clear that the pigs were not received (to be carried) on the terms stated in the declaration.

In *Snead* v. *Shrewsbury and Hereford* (1855) cattle arrived too late for the Stamford Fair. There was a special agreement, and the Company were held not to be "common carriers" of cattle: hence the judgment was for the Company. Lord Campbell told the Jury—"If the station-master made a verbal contract, the action was maintainable, and could not be done away with by the subsequent printed notice after the verbal contract had been entered into and after the cattle were loaded."

In *White* v. *Great Western* (1857) cheese reached Basingstoke too late for market, taking from November 12 to 15 from Bath. Sender signed the Company's special contract. Justice Cresswell confirmed the non-suit of the Court below, and held the condition was reasonable.

In *Wren* v. *Eastern Counties* (1859) fish was *customarily* carried from Yarmouth to arrive in Hitchen at 8 a.m., but in this case it did not arrive until 11 a.m., after the market. Chief Justice Cockburn held the Company liable, saying—"The reasonableness of the time of the conveyance is to be ascertained by reference to the ordinary course of conveyance to Hitchen," thus overruling the special contract which sender had signed.

In *Beal* v. *South Devon* (1860) sprats from Tor to Paddington were delivered at 10 a.m. instead of 6 a.m., and Baron Bramwell held that the Company's stipulation is most reasonable, that the Company should not be liable for loss of market.

In *Allday* v. *Great Western* (1864) cattle consigned to Bordesley Station, Birmingham, were *overcarried* to

Hockley Station, Birmingham, and hence lost the Birmingham market. Sender signed a special contract, but had no optional rate. Chief Justice Cockburn said—"If the statute (Railway and Canal Act) applied in case of loss by *overcarriage*, I should have been disposed to grant a new trial. The Company admit the delay. It is not merely that the Company will not be responsible for delay, not only for *overcarriage* generally, and not limited to accidental circumstances independent of delay caused by the Company, but *they claim absolute immunity from all injury arising from delay* caused by their own negligence. This I take to be an unreasonable condition. The Company may say, 'We make this special contract: we will carry these animals for a lower price if you will release us from the liability attached to carriers, and will take your chance of the goods arriving at their destination.' If a man enters into such a contract it is unreasonable to say he is not bound by it." Judgment against Company. It would appear that the optional or alternative rate arose from this decision, and although carriers have adopted the alternative rate, the Courts still too frequently make the carrier suffer unjustly.

In *Robinson* v. *Great Western* (1866) twelve horses were sent from Shipton, and missed the Manchester market. They were detained at Wolverhampton twenty-four hours. They were not booked through, and the question arose if the contract was to Wolverhampton Station or Bushbury Junction, where the next Company (London and North Western) would take the horses forward. Chief Justice Erle—"The condition of the special contract means that if anything happens to the horses going along the journey the Company are protected. But by their contract they were to deliver in reasonable time. The Company are responsible for the consequences of the horses not arriving in reasonable time."

In *Lord* v. *Midland* (1867) dead meat, frequently sent by a train due in London at 12.15 midnight, had been

three and a half to nine and a half hours late. The Company's special condition was—"The Company will not be responsible for any damage to meat on the ground of loss of market, provided the same be delivered within a reasonable time after the arrival thereof at the station from whence delivery is made." The Court of Common Pleas confirmed the non-suit, and held the Company's condition to be reasonable.

In *Kirby* v. *Great Western* (1868) cattle were delayed at the departure station for want of trucks, although the trucks had been promised. The usual contract note had been signed, but Baron Martin held that the particular condition as to delay was the same condition as in *Allday* v. *Great Western*, where the condition had been held to be unreasonable, and he must follow that decision. Judgment against Company.

In *Finlay* v. *North British* (1870) sprats, Edinburgh to London, missed the market, arriving in the afternoon instead of 5 a.m. A special contract was signed at owner's risk. Plaintiff, however, contended he made a special contract with one of the Company's checkers, irrespective of the general agreement, and that the general agreement he had made was "unjust and unreasonable" and illegal. Lord Ardmillan held the special contract was valid, and the Court gave Judgment for Company. Lord Kinloch dissented.

In *Gallagher* v. *Great Western* (1874) fish, Waterford to London, was delayed, owing to a fog at sea. The sender had an option of Company's risk rate, 6s. per cwt., and owner's risk rate, 5s. per cwt. He selected the owner's risk rate. Chief Baron Palles said—"Here, however, there is no contention that the higher rate is excessive; if there were, it would have been for the Plaintiff to have required the question to be left to the Jury; and it must now be taken that it was admitted that the usual proved rates (1) for carriage at owner's risk, (2) under the carrier's ordinary liability, were, *inter se*, reasonable. Upon this assumption I am of opinion that the terms were such that, although

they would have been unjust and unreasonable if forced upon the public without affording them the alternative of forwarding their goods upon the terms of liability ordinarily incident to a carrier, they were, under the circumstances of this case, and having regard to the alternative offered by the Company, just and reasonable."

In *Simpson* v. *London and North Western* (1876) Plaintiff consigned cattle spice, Bedford to Newcastle-on-Tyne, and remarked on the note, "Must be at Newcastle Monday, certain;" and he explained to the clerk the goods were wanted there at that time for a show. The cattle spice did not arrive till after the show. Chief Justice Cockburn held the Company liable.

In *Ruddy* v. *Mid. Great Western* (1880) forty pigs were from 29th October to 1st November in transit (on a through journey from Sligo) between Dublin and London, and missed the market. Sender had the option of two rates, and selected that at "owner's risk." Chief Baron Palles held that the pigs had not been carried within reasonable time, and that the special contract did not protect the Company; also that the two rates offered must be reasonable, and whether the two rates are reasonable, *inter se*, must be for a Jury to decide.

In *Gordon* v. *Great Western* (1881) cattle were wrongly detained at Gloucester for carriage, when the carriage had been really paid at sending station. Justice Grove held that the condition as to delay on special contract would not exempt the Company. "The detention was not a casual or accidental detention in the course of delivery, but an intentional detention upon a supposed right of lien which the Company did not possess."

WHERE SENDER OR HIS MAN DOES NOT READ CONDITIONS, BUT HAS AN OPPORTUNITY OF DOING SO, OR WHERE HE CANNOT READ, OR WHERE HE SIGNS WITHOUT READING CONDITIONS.

(See also "Notice must be brought home to Senders.")

	Case No.		Case No.
Davis v. *Willan* (1817)	182	*Kirby* v. *G. W.* (1868)	688
Byrne v. *C. & H.* (1855)	703	*Henderson* v. *Stevenson* (1875) ...	447
M'Cance v. *L. & N. W.* (1861) ...	740	*Parker* v. *S. E.* (1877)	443
G. N. v. *Nisbet* (1864)...	434	*Foreman* v. *G. W.* (1878)	694

DIGEST.

In *Davis* v. *Willan* (1817) Justice Abbott said—"In order to do this it has been the most usual course to put up a notice in the office. But it may happen that the party cannot read; but this is the misfortune of the carrier, or his fault that he does not communicate his intention by some other means: the book-keeper may inform him. In this case notice was stuck up in the office, but it seems that it gave no information to the party, since he was unable to read." Judgment against carrier.

In *M'Cance* v. *London and North Western* (1861) seven horses, a truck load, were declared to be of £10 value each, and, being damaged, Plaintiff claimed at a higher value. Keating (Plaintiff's agent), who made a cross to Plaintiff's name at foot of declaration, swore the declaration was not read over to him, and that he could not read or write; that he did not know what the declaration was, but thought it referred to the loading or unloading. The Company's clerk swore he read over the declaration to Keating, and the Court believed him. Judgment for Company.

In *Great Northern* v. *Nisbet* (1864) a passenger took a ticket, London to Morpeth, as the fare there was cheaper than to Newcastle, where Defendant intended to go. On the ticket was a notice—"This ticket is issued on the understanding that it is only available as a ticket to Morpeth, and not to any other station;

and should the holder alight at any other station, either short of or beyond Morpeth, he or she will have to pay the full second class fare to such station from the place of starting." The Judge expressed the opinion to the Jury that the contract, as contended for by the Company, had been made, and whether Defendant read the conditions on the ticket or not did not alter the case, and it was his own matter whether he read it or not. Verdict for Company.

In *Kirby* v. *Great Western* (1868) Plaintiff's servant, who was unable to read, had signed the usual risk note. Baron Martin held that the Plaintiff's servant's signature was sufficient to bind the Plaintiff. "It would be dangerous to hold that because the man who signed the note did not know its contents the contract would not be valid, when he was sent for the express purpose of making the contract under which the cattle were to be carried."

In *Henderson* v. *Stevenson* (1875) passenger's luggage, value £71, was lost in the wreck of the "Countess of Eglinton," Dublin to Whitehaven. The decision turned upon a notice at the back of the passenger's ticket. Plaintiff swore he never read the notice at back of ticket. The clerk said "he was not in the way of drawing the attention of passengers to the conditions on the back of ticket, nor to the notice on time-tables." The Lord Chancellor, in the House of Lords, said that "it would be extremely dangerous to hold that where a document is complete on the face of it, but having on the back of it something which has not been brought to the knowledge of a contracting party, he should be held to have assented to that which he has not seen, and of which he knows nothing." There was nothing on the face of the ticket referring Plaintiff to the back. Judgment against the carrier.

In *Parker* v. *South Eastern* (1877) luggage had been left in a cloak-room, and lost. The Company stood upon the notice at the back of their ticket. Plaintiff denied a knowledge of the conditions, but admitted he

knew there was printed matter on the back. Lord Bramwell, in the Court of Appeal, said "he was of opinion Plaintiff was bound by the terms, and that it would not be right, or just or reasonable, that he should be allowed to say that he was not aware of the conditions because he had not read them. If Plaintiff knew there was printed matter on the ticket, he was as much bound by the terms it contained as if he had read them, or as if the porter had called his attention to them."

In *Foreman* v. *Great Western* (1878) sender's drover signed the risk note, and he being an illiterate man it was contended his signature did not bind the sender. Baron Cleasby said—"This drover had brought beasts on more than twenty occasions, and had always signed similar documents. The Plaintiff knew the drover signed similar documents. Under these circumstances the Plaintiff who sends a person to sign a document is in the same position as if he had signed it himself, and in the absence of fraud is equally bound by it, whether he reads it or not. The person who sent such a person to sign the document would not alter his own position by sending an illiterate person."

"Wilful Misconduct" Condition in the Special Contract Note.

	Case No.		Case No.
Lindsay v. *G. N. of Scot.* (1872)...	195	*Webb* v. *Great Western* (1877) ...	152
Genister v. *Great Western* (1873)	170	*Hoare* v. *Great Western* (1877) ...	238
Jarman v. *Great Western* (1873)	691	*Haynes* v. *Great Western* (1879)...	173
Harris v. *Midland* (1876)	708	*Goldsmith* v. *Great Eastern* (1881)	153
Lewis v. *Great Western* (1877) ...	172		

DIGEST.

In *Lindsay* v. *Great North of Scotland* (1872) flour, carried at S. to S. rates, was damaged by wet. Sender had the option of two rates. The Company's condition was—

"The Company are not common carriers of goods carried at station to station rates, and will not be responsible for any loss, damage, or delay, except

upon proof that such damage, loss, or delay arose from 'wilful fault or negligence' on the part of the Company's servants."

The waggon was properly sheeted, and there was no evidence to show how the sacks got wet. The Sheriff held the Company not liable.

In *Jarman* v. *Great Western* (1873) cattle were injured by negligent detention. Justice Blackburn, on appeal, observed that evidence of negligence was not necessarily evidence of "wilful misconduct." "If," said the learned Judge, "the Railway Company, having had distinct notice that the running of their trains was dangerous indeed, owing to the badness of the points, and they were to continue to run their trains without the slightest attempt to put the matter right, that, I should say, would be clearly 'wilful misconduct.'"

In *Genister* v. *Great Western* (1873) eleven dozen chairs were damaged, owing to engine and train running over cattle. The cattle in the night time had been unloaded on High Wycombe passenger platform, driven out into outer station yard, and had strayed on to the line. The chairs were carried at "owner's risk." Justice Blackburn—"It is admitted there was no malice in what the servants did (driving cattle out). Here the circumstances do not, in my opinion, amount to 'wilful misconduct,' and I think the County Court Judge was wrong in directing the Jury that 'culpable negligence' was necessarily 'wilful misconduct.'"

In *Harris* v. *Midland* (1876) a cow was found dead in a truck, but no cause could be assigned. It was carried at "owner's risk," the condition specifying that the Company would be responsible for "negligence." Baron Cleasby said—"The onus of proof is upon the Plaintiff. The fact of the cow being found in the condition alleged upon its arrival cannot be sufficient to show that such a state of things was brought about by negligence of the Company." Judgment for Company.

In *Lewis* v. *Great Western* (1877) 156 cheeses were loaded in an open truck on their rims in two tiers,

and suffered damage. There was an option of two rates, and the lower rate was accepted. Lord Justice Bramwell held the Company not liable, as no "wilful misconduct" had been proved. He said—"'Wilful misconduct' is misconduct to which the will is a party. If the person, therefore, whose act it is knows that the act will result in mischief, then this act is 'wilful misconduct;' and, indeed, I go further, and think that it would be wilful misconduct if a man were to do the act not caring whether or not the result might be bad. There is no evidence of 'wilful misconduct,' as I do not think that the London porters knew that they were doing wrong."

In *Webb* v. *Great Western* (1877) a furniture van containing furniture was detained two days at Oxford, because it was found too high to go under some of the railway bridges between Oxford and Buckingham. Justice Mellish said—"I think, in order to show that there was 'wilful misconduct,' Plaintiff ought to have shown that on a certain occasion (preceding) the trucks were found too high for the London and North Western bridges, and that the station-master at Salisbury (sending station) knew it. I do not think that it was enough to show that he was negligent in not previously ascertaining what was the right height of these bridges, and that the van must be necessarily of such a height as to go through them."

In *Hoare* v. *Great Western* (1877) the station agent delivered the goods to Jarvis because Jeeves refused them and Jarvis applied for them. The goods had been misdirected to Jeeves. Lord Chief Justice Coleridge said—"He deliberately gave up the goods to the wrong person without making any inquiry, and that amounts to 'wilful misconduct,' and it is not the less wilful misconduct because it is also gross negligence."

In *Haynes* v. *Great Western* (1879) two horse rakes were damaged from, as it was alleged, being loaded on a truck too short for them, which Plaintiff contended constituted "wilful misconduct." The sender had the

option of two rates, and selected the "owner's risk." Justice Grove said—"I certainly cannot undertake to say that placing upon a truck rakes longer than the truck itself necessarily imports 'wilful misconduct.' I borrow the definition of Lord Justice Brett in *Lewis* v. *Great Western* on 'wilful misconduct':—'Or if he does or omits to do something which everybody must know is likely to damage the goods, then he is doing that which he knows to be a wrong thing to do.'" Judgment was given in favour of the Company.

In *Goldsmith* v. *Great Eastern* (1881) damages, £5, were claimed for delay to two bags clover seed, delayed from March 18 to April 1, owing to delivery to the wrong person. The seed was received too late for the spring sowing season. The Court of Queen's Bench confirmed the County Court decision, "that the delivery of the seed by the Company to a wrong person when conveyed by them at owner's risk amounted to 'wilful misconduct,' because it was gross carelessness." Judgment against Company.

SPECIAL CONTRACT WHERE SENDER HAD OR SHOULD HAVE HAD THE OPTION OF TWO RATES, THE HIGHER AT COMPANY'S RISK (COMMON CARRIER) AND LOWER AT OWNER'S RISK (SPECIAL CARRIER). A CARRIER CANNOT FORCE A SPECIAL CONTRACT ON HIS CUSTOMER.

	Case No.		Case No.
Wyld v. *Pickford* (1841)	82	*Lewis* v. *Great Western* (1877)...	172
Lloyd v. *W. & L.* (1862)	741	*Foreman* v. *Great Western* (1878)	694
Allday v. *Great Western* (1864)	683	*Corrigan* v. *M. S. & L.* (1880) ...	709
Rooth v. *North Eastern* (1867)...	686	*Ruddy* v. *Mid. G. W.* (1880) ...	695
Finlay v. *North British* (1870)...	150	*M'Nally* v. *L. & Y.* (1880)	710
Genister v. *Great Western* (1873)	170	*Patterson* v. *B. & N. C.* (1882) ...	186
D'Arc v. *L. & N. W.* (1874) ...	171		

DIGEST.

In *Wyld* v. *Pickford* (1841) it was held—"A carrier is bound to convey goods only on payment of the full price (which depends on their value) for the carriage, and if not paid, it is competent to him to limit his liability by special contract. A carrier who receives

valuable goods, after notice to the sender that he will not be responsible for loss or damage unless a higher than the ordinary rate of insurance is paid for the carriage of such goods, does so on the terms of such notice."

In *Lloyd* v. *Waterford and Limerick* (1862) two rates were offered sender: he sent the horses at the owner's risk rate, attached to which was a condition that the Company would not be liable for injuries unless pointed out to the Company's agent at the time of unloading. This the Court of Queen's Bench (Ireland) held to be unreasonable, and the Company were made to pay for the damage.

In *Allday* v. *Great Western* (1864) cattle were over-carried, and the Company relied upon the cattle ticket signed by sender, where mention was made of a special *reduced charge*. Chief Justice Cockburn said—"The Company may say, 'We make this special contract: we will carry these animals for a lower price if you will release us from the liability attached to carriers, and will take your chance of the goods arriving at their destination.' If a man enters into such a contract it is unreasonable to say he is not to be bound by it. But although the expression *reduced charge* occurs in this contract, it does not appear to have been used with reference to a greater rate by which the sender might have gained additional security."

In *Rooth* v. *North Eastern* (1867) cattle, after being unloaded, strayed on to line, and were killed. Chief Baron Kelly said—"Where an advantage (*i.e.*, free pass for drover) conferred upon the owner of cattle disentitles him of complaining of the unreasonableness of a condition, an alternative must be presented to him. The alternative must be of accepting the advantage proffered, and relieving the Company of a portion of their liability, or of rejecting the advantage proffered, and holding the Company to their common law liability entire and unlimited. Now here no such alternative was offered. I am not prepared to say that

the provision that the owner undertakes all risk of loading and unloading would be in itself unreasonable. If the Company think fit to commit to the owner himself, or to his servants, the business of putting the cattle into the trucks, and afterwards unloading them, I certainly do not see why, if the owner of the cattle is willing to take that part of the business, a stipulation on the part of the Company that they shall not be liable, even for any negligence committed by their servants, in relation to that part of the conveyance of the cattle should be considered unreasonable."

In *Finlay* v. *North British* (1870) the contention was that £4 13s. 4d. per ton, Company's risk, against £3 15s. per ton, owner's risk, Edinburgh to London, for sprats was a prohibitory rate, and hence sender had no option, and practically was forced into the agreement. The Lord President held that if a Company's risk rate were prohibitory it would leave sender no option, but as sprats averaged £8 per ton value in London, the difference between the two rates was not prohibitory in this case.

In *Genister* v. *Great Western* (1873) Justice Blackburn said—"In this case the Great Western Company, being common carriers, may carry goods as insurers; and if owners can avail themselves of those terms when they please, they can also carry at a less price with less risk, provided the conditions be reasonable. There is no pretence here that the condition in this case is prohibitive because the Plaintiff cannot adopt alternative terms of carriage, nor because the condition is unreasonable. What we have really to decide is the terms of the contract, and I understand the condition to relieve the Company from all liability except for damage which might be caused by the 'wilful misconduct' of their servants."

In *D'Arc* v. *London and North Western* (1874) the sender had the option of two rates, but it would appear the only special contract was a remark on docket, "Forward packages at our own risk." Justice

Denman held, "if the loss of the goods on the railway, or their delay and consequent damage, had been the probable risk evidently in the contemplation of the sender," the Company would have been exempted from mis-sending, delay, and damage by wet to a wax-work figure. Here the failure arose from the proper printed form not having been used.

In *Lewis* v. *Great Western* (1877) Lord Justice Bramwell said—"Here the Company propose to carry under two agreements—one of ordinary liability as carriers, and the other at the owner's risk. There is evidence here that the sender forwards them at owner's risk, but plus the liability of the Company for the 'wilful misconduct' of their servants. Here is an option given to a man: 'We will take the ordinary liability of a carrier, or else pay us less and take the risk yourself.' How can we say this is unreasonable?"

In *Foreman* v. *Great Western* (1878) Baron Cleasby held that "upon the question of there being an option, we have, in the first place, the signed conditions, which expressly offer the option; then the fact that the ordinary rates of carriage, with the carrier's usual responsibility, as appointed to be taken by the Company, were stuck up in the office. The mere fact that the lower rate was so low is no evidence that the higher rate was unreasonable or prohibitory" (£18 8s. 6d. as against £75 7s. 4d.). Judgment was therefore for Company.

In *M'Nally* v. *Lancashire and Yorkshire* (1880) two cattle were suffocated on the voyage, Dublin to Liverpool, on a through contract to Manchester. The City of Dublin Steam Packet Company, acting as agents for Defendants, booked the cattle at owner's risk, and one of the conditions attached to the Company's risk rate was "that the Company would not be accountable for the correct selection of each owner's stock on landing (in Liverpool), nor on loading into the waggons at Liverpool Station, nor on unloading at destination." Lord Chancellor O'Hagan held that

this condition was not consistent with the Company's common law liability when carrying at Company's risk, and consequently the contract for carriage at owner's risk made by Plaintiff was vitiated, he not having a fair and reasonable option of two rates.

In *Ruddy* v. *Midland Great Western* (1880) pigs, Sligo to London, an alternative rate was offered sender, and he took the lower rate. The case was withdrawn from the Jury, and, on appeal, Chief Baron Palles held that there was a question for a Jury—(1) Whether the two rates offered must be reasonable to render the alternative reasonable? (2) Whether the two rates are reasonable, *inter se*, must be for the Jury. Judgment against Company on this point.

In *Corrigan* v. *Manchester Sheffield and Lincolnshire* (1880) cattle were killed and injured on the sea portion of the journey, Dublin to March. The sender had an option of two rates—Company's risk and owner's risk. He chose the owner's risk rate. Attached to the owner's risk rate was the condition—"The Company will not be responsible for loss arising in any way from the overcrowding of such waggons, or for injuries done in the loading or unloading in consequence of one animal injuring another." Baron Fitzgerald in this case said the alternative rate here offered to the Plaintiff was not the common law liability in respect of default or neglect, but only *another special contract*, with conditions limiting such common law liability. Judgment against the Company, because the option offered to the sender was not a fair option.

In *Patterson* v. *Belfast and Northern Counties* (1882) eggs, Ballymoney to Paisley, were damaged. They were carried at owner's risk rate, 27s. 6d. per ton, while the Company's risk rate was 35s. per ton. The sender had the option of the two rates, and chose the lower rate. Chief Baron Palles held that the two rates, *inter se*, must be reasonable. He said—"But of one thing I am clear, and it is upon that I decide this case: that there must be very clear and conclusive

evidence that the real value of the additional liabilities there is upon the Company by carrying under the 7th section (Railway and Canal Act) contract—that is, that the ordinary liability of the Company in fact is fairly represented by the additional 7s. 6d. (difference between two rates). My own belief is, and it is confirmed by the evidence of the manager of the Company, that this (35s.) was never intended to be a real rate at all, or to be acted upon, and therefore I will reverse and grant the decree" (against the Company).

Special Contracts in respect to Negligence, Gross or Culpable.

	Case No.		Case No.
Beck v. *Evans* (1812) ...	... 175	*Pardington* v. *S. W.* (1856)	... 704
Riley v. *Horne* (1828) ...	... 64	*Phillips* v. *Clark* (1857) ...	... 176
Beckford v. *Crutwell* (1832)	... 183	*M'Manus* v. *L. & Y.* (1859)	... 739
Wyld v. *Pickford* (1841) ...	... 82	*Hodgman* v. *W. Mid.* (1864)	... 747
Hinton v. *Dibbin* (1842) ...	... 70	*Rain* v. *G. S. & W.* (1869)	... 706
Carr v. *L. & Y.* (1852) ...	... 746	*Jarman* v. *G. W.* (1873) ...	... 691

DIGEST.

In considering the following cases it must be borne in mind that after the passing of the Carriers' Act (1830) the fact of negligence, as distinguished from felony, ceased to be of avail to render the carrier liable for such goods as came within the Act, and were in value over £10, and the value was not declared.

In *Beck* v. *Evans* (1812) a cask containing brandy, value £70, was found to be leaking from the waggon while being carried by road. Although the waggoner knew of the leakage at Birmingham, it was not until he passed Wolverhampton he took steps to stop the leakage. The Judge left it to the Jury whether the injury arose from negligence of the waggoner in not examining the cask when advised it was leaking. Verdict against carrier. Lord Ellenborough confirmed this verdict on appeal, in face of the carrier's notice he would not be responsible for goods over £5 value, &c.

In *Riley* v. *Horne* (1828) Chief Justice Best said—"Although a carrier may prove that the owner of the goods knew that the carrier had limited his responsibility by a sufficient notice, yet if a loss be occasioned by gross negligence that notice will not protect him. Every man that undertakes for reward to do any service obliges himself to use due diligence in the performance of that service. Independently of his responsibility as an insurer, a carrier is liable for gross negligence. This point is settled by *Sleat* v. *Fagg*, *Wright* v. *Snell*, *Birket* v. *Willan*, *Beck* v. *Evans*, and *Bodenham* v. *Bennett*. The Jury are to decide what is gross negligence."

In *Beckford* v. *Crutwell* (1832) the action was for not safely carrying a picture, value £80, and the carrier was held liable because he did not send two waggoners with seven horses instead of only one. The Jury found "gross negligence" in employing only one waggoner. Lord Tenterden said the carriers' notice could not protect him.

In *Wyld* v. *Pickford* (1841) it was held—"The carrier, notwithstanding this notice (of special contract), is bound to take ordinary care in the conveyance, and is liable, not only for a total abandonment of his character or wilful negligence, but also for a conversion by misdelivery which has arisen from inadvertence or mistake, if such inadvertence or mistake might have been avoided by ordinary care."

In *Hinton* v. *Dibbin* (1842) a bale of silk, over £10 value, was lost. Its value had not been declared. Plaintiff charged the carrier with "gross negligence," which, under the old form of carrier's notice, would have overridden the carrier's notice. This, was a leading case tried under 11 Geo. IV. and 1 Will. IV., cap. 68 (the Carriers' Act). The Court held the plea of "gross negligence" would not lie, and the carrier, in the absence of sender declaring the value, was not liable.

In *Carr* v. *Lancashire and Yorkshire* (1852) a horse,

during violent shunting, was injured, and died subsequently. It was a special contract, from the notice at bottom of cattle ticket. The verdict of the Jury was "gross carelessness" against Company. Baron Parke, on appeal, said—"The only question here is whether the Company have protected themselves (by special contract) against loss arising from their gross negligence in carrying the Plaintiff's horse. I am of opinion the Plaintiff has taken upon himself all risk of conveyance, and the Railway Company are only bound to find carriages and propelling power." Baron Anderson said—"If we hold the carriers in this case responsible for gross negligence, we shall place them in the situation of insurers and underwriters."

In *Pardington* v. *S. W.* (1856) ten cattle were smothered during transit in a salt van; the pin of the lid of the van did not prevent the lid closing down. Special contract note was signed as follows:—"Nor from suffocation, or from being trampled upon, bruised, or otherwise injured in transit, from fire or any cause whatsoever." A drover travelled with the train on a free pass. Chief Baron Pollock said—"It appears to me quite reasonable that such a stipulation should be made as was made in the present case. The common law liability does not apply to cattle; the Company only hold themselves out as carriers of horses and cattle *sub modo*." Judgment for Company.

In *Phillips* v. *Clark* (1857) thirteen butts of sherry, London to Calcutta and back, were damaged by breakage and leakage. The damage arose from negligence in stowage. On bill of lading was inserted, "Weight and contents unknown; not accountable for leakage and breakage." Chief Justice Cockburn said—"I admit that a carrier may protect himself even from the effects of his own negligence by a contract to that effect, if he can find anyone to contract with him. I think, however, that we ought not to put that construction on a contract unless it is unambiguous in its terms. The question then is, whether, looking at the

terms of this contract, we can see that a person delivering his goods under it has done so on the understanding that the carrier might deal with them negligently without being responsible. I do not think we can do so." Judgment against carrier.

In *M'Manus* v. *Lancashire and Yorkshire* (1859) three horses were injured from a hole being made in the bottom of the truck during transit. A special contract note had been signed. Justice Williams, in Exchequer Chamber, said—"It is unreasonable that the Company should stipulate for exemption from liability from the consequences of their own negligence, however gross, or misconduct, however flagrant, and that is what the condition under consideration professes to do." The Company were held liable.

In *Hodgman* v. *West Midland* (1864) a racehorse with other racehorses were standing on loading platform, waiting turn to be loaded. The front horses backed, and the horse in question, with the groom at its head, backed. There were some sharp-edged girders lying on the platform, and the horse got injured against the girders, and had to be killed. The horse had not been booked or received. The Jury gave a verdict of "negligence" against the Company. The Court of Queen's Bench confirmed this verdict; and Chief Justice Cockburn, while dissenting from the rest of the Court as to the Company's liability as special carriers, held the Company were liable on their "common law" liability for "negligence" in allowing the obstruction of the girders.

In *Rain* v. *Glasgow and South Western* (1869) two cattle in a waggon of thirteen cattle were trampled to death from overcrowding. Special contract was signed. On appeal to the Court of Session, the Lords found that injury to cattle arose from the fault of the Plaintiff in putting thirteen cattle into a waggon not sufficiently large, and found no negligence on part of Company. Sheriff's verdict reversed, and Company held not liable.

In *Jarman* v. *Great Western* (1873) cattle were injured by negligent detention. Justice Blackburn, on appeal, observed that evidence of negligence was not necessarily evidence of "wilful misconduct." "If," said the learned Judge, "the Railway Company, having had distinct notice that the running of their trains was dangerous indeed, owing to the badness of the points, and they were to continue to run their trains without the slightest attempt to put the matter right, that, I should say, would be clearly 'wilful misconduct.'"

WHERE THE CARRIER BY A SPECIAL AGREEMENT LIMITS HIS LIABILITY IN CASE OF FIRE AND THE DESTRUCTION OF THE GOODS DURING TRANSIT.

(See also cases of fire where the goods are held by a warehouseman.)

	Case No.		Case No.
Forward v. *Pittard* (1785)	187	*Martin* v. *G. I. P.* (1867)	189
Collins v. *B. & E.* (1859)	11	*Scaife* v. *Farrant* (1875)	190
Maljee Sewjee v. *G. I. P.* (1866) ...	169		

DIGEST.

In *Forward* v. *Pittard* (1785) twelve pockets of hops had been accepted at Weyhill, where an annual fair is held, to carry to Shaftesbury by road. The hops were stored by carrier in a booth; the booth took fire from a neighbouring booth, and the hops were burnt. There was no special contract. Lord Mansfield held that the contract of carriage had commenced, that the carrier was an insurer, that the fire was not by lightning or the act of God, and that the carrier was responsible.

In *Collins* v. *Bristol and Exeter* (1859) it was decided in the House of Lords that the special contract in respect to fire exempted the Company from liability for a waggon of furniture, from Bath to Torquay, which was burnt on a siding at Exeter.

In *Maljee Sewjee* v. *G. I. P.* (1866) cotton, valued at

£443, was burnt in transit on the waggons, as it was alleged, by sparks from the engine. The Judge of the High Court of Bombay said that it rested with Plaintiff to prove negligence. No evidence was given to show coal was burned in the engine, while the driver swore coke was burned. Nobody could assign the cause of the fire. It may have arisen from spontaneous combustion, or from sparks from the engine. If there had been sparks seen issuing from the engine, he should have called upon the Plaintiff to show the engine was worked with negligence, and that an unusual quantity of sparks were emitted. If the sparks occurred when the engine was driven with the usual material, he should still hold that the notice (special agreement) would prevent the Company from being liable.

In *Martin* v. *G. I. P.* (1867) an officer's luggage was destroyed during transit in India by fire. The luggage was carried for the Government as baggage of troops at the Government rate, the Company accepting no responsibility, and a military guard accompanying the baggage. Chief Baron Kelly, in the Court of Exchequer, held that although Plaintiff could not sue the Company for non-performance of their duty as carriers, Plaintiff was entitled to sue for an injury done to his property through the Company's negligence whilst the luggage was in their custody. Judgment against Company.

In *Scaife* v. *Farrant* (1875) the Defendant was a carrier owning furniture vans, and he contracted to carry some furniture from Paignton to Plymouth, using the railway for part of the journey. The furniture was destroyed by fire during transit. Plaintiff signed the following printed form:—"I hereby agree to pay you the sum of £22 10s. for the removal of my furniture and effects from Paignton to Plymouth, you undertaking risk of breakage (if any) not exceeding £5 on any one article." —H. M. Scaife. Justice Lush held that there was no negligence, that the fire was accidental, that there was a special contract, and that the carrier was not liable, being a special carrier and not a common carrier.

THE OLD RIGHT OF COMMON CARRIERS MAKING QUALIFIED ACCEPTANCES TO CARRY (SPECIAL CONTRACTS), AND WHICH IS NOW MODIFIED, AS FAR AS RAILWAY AND CANAL CARRIERS ARE CONCERNED, BY 17 & 18 VIC., CAP. 31, SEC. 7.

	Case No.		Case No.
Story on Bailments (*sec.* 549).		*Batson* v. *Donovan* (1820) ...	50
Nicholson v. *Willan* (1804) ...	61	*Wyld* v. *Pickford* (1841)	82
Smith v. *Horne* (1818)	67	*Carr* v. *L. & Y.* (1852)	746

DIGEST.

Story on Bailments, *sec.* 549.—"We come next to consider the effect of special contracts and notices of carriers. It was formerly a question of much doubt how far common carriers on land could by contract limit their responsibility upon the ground that, exercising a public employment, they are bound to carry for a reasonable compensation, and had no right to change their common law rights and duties. And it was said that, like innkeepers, they were bound to receive and accommodate all persons, as far as they may, and could not insist upon special and qualified terms. The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note to *Southcote's Case* (4 Rep., 84), and it was admitted in *Mors* v. *Slue* (1 Vent., 238). It is now fully recognised and settled beyond any reasonable doubt. Still, however, it is to be understood that common carriers cannot, by any special agreement, exempt themselves from all responsibility, so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice, exempt themselves from all responsibility in cases of gross negligence and fraud, or, by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive limitations of his rights; and the carrier will be equally liable in the case of

fraud or misconduct of his servants as he would be in case of his own personal fraud or misconduct."

In *Nicholson* v. *Willan* (1804) Lord Ellenborough said —"But considering the length of time during which, and the extent and universality in which the practice of making such acceptances of goods for carriage by land and water has now prevailed in the kingdom, under the observation and with the allowance of Courts of Justice, and with the sanction also and countenance of the Legislature itself, which is known to have rejected a Bill brought in for the purpose of narrowing the carrier's responsibility in certain cases on the grounds of such a measure being unnecessary, inasmuch as the carriers were deemed fully competent to limit their own responsibility in all cases by special contract; considering also that there is no case to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility has ever been by express decision denied, we cannot do otherwise than sustain such right in the present instance, however liable to abuse and productive of inconvenience it may be, leaving to the Legislature, if it should think fit, to apply such remedy hereafter as the evil may require."

In *Smith* v. *Horne* (1818) Justice Burrough said— "The doctrine of notice was never known until the case of *Forward* v. *Pittard* (1785), which I argued many years ago. Notice does not constitute a special contract. If it did it must be shown on the record; it only arises in defence of the carrier, and here it is rebutted by proof of positive negligence. I lament that the doctrine of notice was ever introduced into Westminster Hall." (I cannot trace any mention of a carrier's notice in the report of *Forward* v. *Pittard*, but I suppose it grew out of the decision of this case.)

In *Batson* v. *Donovan* (1820) Justice Best said—"The carrier is entitled to have his reward paid to him before he takes the package into his custody. He always was at liberty to make a special acceptance of

the goods, and to introduce into the terms of such acceptance any reasonable condition not inconsistent with his duty to the public."

In *Wyld* v. *Pickford* (1841) it was held that "a carrier is bound to convey goods only on payment of the full price (which depends on their value) for the carriage, and if not paid, it is competent to him to limit his liability by special contract. A carrier who receives valuable goods, after notice to the sender that he will not be responsible for loss or damage unless a higher rate than the ordinary rate of insurance is paid for the carriage of such goods, does so on the terms of such notice." (This case, however, was before the Act of 17 & 18 Vic., cap. 31, sec. 7, 1854.)

In *Carr* v. *Lancashire and Yorkshire* (1852) a horse in horse-box was damaged during shunting. A special contract was proved. Baron Parke said—"It is clear that since the passing of the Carriers' Act it is competent for a carrier to make a special contract to convey goods, and that the liability may be made to depend upon the terms of the contract. The practice of a carrier protecting himself by a mere notice was put an end to by the Carriers' Act. Whether the Company are liable by their common law liability, there is no necessity to discuss upon the present state of this record. Sheep, cattle, and horses were not commonly carried by the old road carriers. These are new risks brought about by railways, and it is very reasonable that carriers should be allowed to protect themselves against such risks to which in these modern times they are exposed. The rapid motion, the noise of the engine, and various other matters, are apt to alarm horses and cause them to do injury to themselves. I am of opinion the Plaintiff has taken upon himself all risk of conveyance, and that the Company are only bound to find carriages and propelling power. The Company say they will not be responsible for any injury or damage, however *caused*. Thus the Plaintiff is to stand to all risk of accident or

injury; and, when we look at the nature of the thing conveyed (the horse), there is nothing unreasonable in this arrangement." Baron Martin said—"If we hold the carriers in this case responsible for gross negligence, we shall place them in the position of insurers and underwriters."

SPECIAL CONTRACTS OR NOTICES IN RESPECT TO DAMAGE BY LEAKAGE.

	Case No.		Case No.
Phillips v. *Clark* (1857) ...	... 176	*Phillips* v. *Edwards* (1858)	... 177

DIGEST.

In *Phillips* v. *Clark* (1857) thirteen butts of sherry, London to Calcutta and back, suffered loss from leakage from negligence in stowage. The notice on bill of lading was, "Weight and contents unknown; not accountable for leakage or breakage." Chief Justice Cockburn said—"Whether, looking at the terms of the contract, we can see that a person delivering the goods under it has done so on the understanding that the carrier might deal with them negligently without being responsible. I do not think we can do so." Judgment against carrier.

In *Phillips* v. *Edwards* (1858) a cask of brandy became staved, broken, and damaged in the hold of a steamer. "The owners give notice that they will not receive any goods for conveyance by their vessels except upon the terms that they shall not be responsible for any loss or damage of or to such goods from any cause whatever during transit." Chief Baron Pollock held the carrier was not liable for the leakage under the notice.

LIMITATION OF TIME FOR CLAIMS TO BE MADE AFTER DELIVERY.

	Case No.
Lewis v. *Great Western* (1860)	167

DIGEST.

In *Lewis* v. *Great Western* (1860) among several packages of furniture was a bag of clothes. Twelve

days after delivery consignee discovered the bag contained empty corn sacks, and not the clothes. Plaintiff had signed a note on which were conditions that claims for loss must be made in seven days, and for deficiency, damage, or detention, in three days after delivery. Chief Baron Pollock, on appeal, held the condition to be reasonable, and the Company were not liable for the loss of the clothes.

A NOTICE EXHIBITED WILL NOT ESTABLISH A SPECIAL CONTRACT: THE SPECIAL CONTRACT MUST BE SIGNED, AND THE SUBSTANCE OF THE CONTRACT BROUGHT HOME TO THE PERSON SIGNING.

	Case No.		Case No.
Davis v. *Willan* (1817)	182	*Crisp* v. *Y. N. & B.* (1854)	675
Kerr v. *Willan* (1817)	164	*Simon* v. *Great Western* (1856) ...	165
Palmer v. *Grand Junction* (1839)	735	*Peek* v. *North Staffordshire* (1863)	168
Walker v. *Y. & N. M.* (1852) ...	145	*D'Arc* v. *L. & N. W.* (1874)... ...	171
G. N. v. *Morville* (1852)	738	*Lewis* v. *G. W.* (1877)	172
G. W. v. *Goodman* (1852)	444		

DIGEST.

It will be seen from the cases following that before 1854 the carrier, by a notice brought home to the knowledge of the sender, could limit his responsibility; but after the passing of the Railway and Canal Traffic Act, 1854, the carriers' common law liability could only be limited by an agreement signed by the sender, and subject to a higher Court holding that the conditions of the contract were just and reasonable.

In *Davis* v. *Willan* (1817) Judge Abbott held—"In this case notice was stuck up in the carrier's office, but it seems that it gave no information to the party, since he was unable to read, and I think that the notice has not been sufficiently brought home to the knowledge of the party." Judgment against carrier.

In *Kerr* v. *Willan* (1817) sender's porter admitted he saw a notice painted on a board at the carrier's office, and although he could read, he did not read the notice,

though often at the office. Lord Ellenborough held—"A carrier may limit his responsibility by giving notice in the public papers, or by any other medium by which the party with whom he deals is effectually apprised of the terms upon which he proposes to deal." The porter not having read the notice, the carrier was held liable.

In *Palmer* v. *Grand Junction* (1839) Baron Parke said—"The Company's Act does not compel them (the Company) to be common carriers. It only enables them to be so, so far as they shall think fit, and when they have elected to become so, they are liable in that character in the same way that other common carriers are. If the Company choose to carry (the horses), and do not take care to accept the goods (traffic) with a limited responsibility," &c. It was a consignment of horses damaged. The receipt for the carriage embodied a special contract, but sender denied getting the receipt, and the verdict of the Jury was that he did not get it. Judgment against the Company as common carriers, in absence of a special contract.

In *Walker* v. *Y. & N. Mid.* (1852) Chief Justice Lord Campbell held that a printed notice, which had been *specially served* by messenger upon sender before despatch of fish, established a "special contract." "There is abundant evidence of the special contract. I think there is evidence to show the fish were re-received under a special contract, because it appears, and the Jury have found, that notice limiting the liability of the Company was delivered, and afterwards Plaintiff delivered the fish to be carried."

In *Great Western* v. *Goodman* (1852) a trunk of passenger's luggage was lost, and the Company contended their bye-law exempted them from liability: "The Company will not be responsible for care of same (luggage) unless booked and paid for accordingly." Justice Maule said—"Can it be said that the bye-law has any effect when the Plaintiff had no knowledge of it? Is it competent for the Company by a bye-law to

repeal their common law liability as carriers?" The Judgment was against the Company.

In *Great Northern* v. *Morville* (1852) the sender signed the usual risk note. Justice Erle held that "whether sender had signed the paper, or whether the clerk had mentioned what the terms were for carriage of the cattle, there would have been in each case good evidence of an agreement between the parties." The 4th section of the Act of 1854 provides that "public" notices shall no longer be of avail, but that section does not affect section 7, by which every carrier is left free to make a special agreement with the party sending goods.

In *Crisp* v. *Y. N. & B.* (1854) the sender had accepted the Company's tickets for carriage of cattle with a notice at the back that the Company would not be responsible for delay, and the Chief Justice of the Court of Common Pleas held that this constituted a special contract. The Company were not common carriers of cattle unless there should be evidence to show that they held themselves out as common carriers of cattle. This case was tried in April, 1854, and the Act was not passed until July, 1854. The case of *Hughes* v. *Great Western* is a similar case.

In *Simon* v. *Great Western* (1856) Chief Justice Jervis held that the 7th section of .Carriers' Act meant "that all notices and conditions which heretofore were given, and by which the public were affected by knowledge or notice, shall be null and void to relieve railway carriers of responsibility for negligence. And although it (special contract) be just and reasonable, it shall not be binding on the party unless it be signed by the party who is to be affected by the contract." Lord Westbury, in *Peek* v. *North Staffordshire*, in 1863, referred to this Judgment, and followed on the same lines.

In *Peek* v. *N. S.* (1863) sender wrote to the Company at Stoke—"Please forward the three cases of marble

not insured to W. Peek, Esq., to be called for at Camden Town Station, London." The damage arose from wet and rust from the nails of the packages, which, with the water, had soaked through the cases and discoloured the marble. Lord Westbury, in the House of Lords, held that "It is not competent by any description of parol evidence so to interpret the words 'not insured' as to embody or incorporate the condition itself into the letter, and thereby make it a special contract in writing within the 7th section of the Act of 1854." The Judgment was consequently against the Company.

In *D'Arc* v. *L. & N. W.* (1874) a wax-work figure in a case was delayed and damaged by wet. Senders used their own forwarding note, on which was written, "Forward packages at our own risk." Justice Denman held that such remark as this was not sufficient, as "the delay and consequent damage had not been the probable risk evidently in the contemplation of the sender."

In *Lewis* v. *G. W.* (1877) the sender's own note formed the basis of contract. It was *signed* by sender, with a remark on it, "Owner's risk." Sender admitted in evidence he was in the habit of sending goods at the lower rate (owner's risk), and was aware of the Company's conditions. Lord Justice Bramwell, in Court of Appeal, held that this was sufficient to establish a special contract, and gave Judgment for the Company.

THE CARRIER IS NOT RESPONSIBLE TO FEED CATTLE ON THE JOURNEY.

Case No.

Kirby v. *Great Western* (1868) 688

DIGEST.

In *Kirby* v. *Great Western* (1868) Baron Martin said—"If the injury to the cattle arose from want of food, the carrier was not liable for that any more than if a

parcel insufficiently packed were lost in the carriage through insufficient packing. The owner was bound to see to feeding his cattle. With respect to the cow that died the question was the same. If it died from exhaustion, consequent on want of food, the Company were not liable."

IF IT BE SHOWN THAT THERE ARE TWO SETS OF TERMS IN THE COURSE OF DEALING WITH A CARRIER, THE LAW ACCEPTS THE ONE LEAST FAVOURABLE TO THE CARRIER.

	Case No.		Case No.
Phillips v. *Edwards* (1858) ...	177	*Ruddy* v. *Mid. G. W.* (1880) ...	695

CATTLE PLATFORM ACCIDENTS, WHERE CATTLE OR HORSES ARE INJURED IN LOADING OR UNLOADING OR IMMEDIATELY AFTER BEING UNLOADED.

See following cases:—

	Case No.		Case No.
Hodgman v. *West Mid.* (1864)...	747	*Combe* v. *L. & S. W.* (1874) ...	749
Rooth v. *North Eastern* (1867)	686	*Moore* v. *Great Northern (Ireland)* (1882)	744
Gill v. *M. S. & L.* (1873)... ...	728		

ONUS OF PROOF.

	Case No.		Case No.
Wyld v. *Pickford* (1841)	82	*Lewis* v. *G. W.* (1877)...	172
Maljee Sewjee v. *G. I. P.* (1866)...	169	*Webb* v. *G. W.* (1877)...	152
Kendall v. *L. & S. W.* (1872) ...	743	*Haynes* v. *G. W.* (1879)	173
Genister v. *G. W.* (1873)	170	*Ruddy* v. *Mid. G. W.* (1880) ...	695
Harris v. *Midland* (1876)	708		

DIGEST.

In *Wyld* v. *Pickford* (1841) it was held that a special carrier (carrying under a special contract) is bound to take ordinary care in the conveyance, and is liable, not only for a total abandonment of his character or

wilful negligence, but also for a conversion by misdelivery which has arisen from inadvertence or mistake, if such inadvertence or mistake might have been avoided by ordinary care; that, in such case, the burden of proof would lie on the Plaintiff.

In *Maljee Sewjee* v. *G. I. P.* (1866) cotton, valued at £443, was burnt in transit on the waggons, as it was alleged, by sparks from the engine. The Judge of the High Court of Bombay said that it rested with Plaintiff to prove negligence. No evidence was given to show coal was burned in the engine, while the driver swore coke was burned. Nobody could assign the cause of the fire. It may have arisen from spontaneous combustion, or from sparks from the engine. If there had been sparks seen issuing from the engine, he should have called upon the Plaintiff to show the engine was worked with negligence, and that an unusual quantity of sparks were emitted. If the sparks occurred when the engine was driven with the usual material, he should still hold that the notice (special agreement) would prevent the Company from being liable.

In *Kendall* v. *London and South Western* (1872) a horse was injured from "its proper vice." Baron Pigott said—"The present case is reduced to one of onus of proof, and upon whom is such onus cast? It seems to me the carrier should, if he rely upon any exception to his common law liability, show by affirmative proof that the case is brought within the exception."

In *Genister* v. *Great Western* (1873) cattle were run over by a train and killed. They were carried under a special contract. Justice Blackburn said—"There is nothing (evidence) to show that what they (Company's porters) wilfully did—that is, drive the cattle into the yard—was likely to cause injury to the Plaintiff's cattle, or that they had knowledge of any danger to which they were exposing either the cattle or the train by what they did."

In *Harris* v. *Midland* (1876) a cow, on the arrival of

the truck at destination, was found dead. Baron Cleasby said—"I am of opinion the Judgment must be for the Company. The onus of proof is on the Plaintiff. The Company engage to carry safely, but to be liable only for negligence. There was no evidence of negligence here, only conjecture. The injury must have been received during transit, but there is not sufficient evidence to show how it was inflicted. The Plaintiff must show that death was caused by what he alleges. The fact of its being found in the condition alleged upon its arrival cannot be sufficient to show that such a state of things was brought about by negligence of the Company."

In *Lewis* v. *Great Western* (1877) cheeses were loaded in an open truck, placed on their rims in two tiers, and were injured in transit. A special contract note was signed. Lord Justice Bramwell said—"There is no evidence of 'wilful misconduct,' as I do not think that the (Company's) London porters knew that they were doing wrong."

In *Webb* v. *Great Western* (1877) a furniture van containing furniture was detained two days at Oxford, because it was found too high to go under some of the railway bridges between Oxford and Buckingham. Justice Mellish said—"I think, in order to show that there was 'wilful misconduct,' Plaintiff ought to have shown that on a certain occasion (preceding) the trucks were found too high for the London and North Western bridges, and that the station-master at Salisbury (sending station) knew it. I do not think that it was enough to show that he was negligent in not previously ascertaining what was the right height of these bridges, or that the van must be necessarily of such a height as to go through them."

In *Haynes* v. *Great Western* (1879) damage was done to two horse rakes, carried under special contract. Justice Grove said—"It is therefore necessary for the Plaintiff in an action of this description to prove, that is, give reasonable evidence upon which a Jury might

be directed, in the absence of contradictory evidence, to find that the injury arose from some 'wilful misconduct' on the part of the Company's servants. The evidence must point out such circumstances that a Jury might reasonably infer that the damage arose from the cause alleged, and not from any other causes."

In *Ruddy* v. *Midland Great Western* (1880), pigs, Sligo to London, were delayed. Sender had an alternative rate, and selected the lower rate at his own risk. Chief Baron Palles said—"In my opinion the law has been rightly laid down by Lord Blackburn, that in every case it lies upon the Company to show that the higher rate is a reasonable rate, and that the following questions must be for the Jury: (1) Whether the two rates offered must be reasonable to render the alternative reasonable? (2) Whether the two rates are reasonable *inter se*?"

DECLARATION OR ABSENCE OF DECLARATION AS TO VALUE.

	Case No.		Case No.
M'Cance v. *L. & N. W.* (1861) ...	740	*Robinson* v. *L. & S. W.* (1865) ...	751
Hodgman v. *West Mid.* (1864) ...	747	*Hill* v. *L. & N. W.* (1880) ...	696

DIGEST.

In *M'Cance* v. *London and North Western* (1861) sender, after making declaration that the horses did not exceed £10 each in value, claimed at the rate of £30 to £35 each. Chief Baron Pollock said—"I think the declaration of the value is no part of the agreement to carry. It was a declaration made expressly with a view to induce the Company to carry. It was falsely made to induce them to carry, that is, to enter into the contract. I am of opinion that when persons have made a declaration of that sort for the purpose of inducing others to act, and they have acted upon it, and it turns out to be false, they are so far bound by it that it should not be imposed on a Jury to find any

other value than the value the parties themselves have set upon their property." In *Clark* v. *Gray* (6 East, 564) the declaration of value was held not to be a qualification of the contract.

In *Hodgman* v. *West Midland* (1864) the verdict of the Jury for £1,000 for death of a racehorse from negligence was reduced to £50, the maximum sum mentioned by the statute (17 & 18 Vic., cap. 31, sec. 7), in the absence of a declaration of value. It was held that as soon as the horse entered the Company's premises the act of delivery begins, and Judge Mellor said—"If the party delivering the horse to be carried desires to recover a value beyond £50, he must declare such value before the act of delivery begins, before the horse was taken to the premises of the Company."

In *Robinson* v. *London and South Western* (1865) the Company refused to carry a horse, value £135, unless insurance on that value was paid. Chief Justice Erle said—"I am of opinion the knowledge of the Company as to the value of the mare not derived from a declaration by the sender gives no title to the Company to demand a higher insurance. It is clear that the knowledge gained by the station-master through the telegraph (sender's telegram as to value) gave the Company no right to demand the insurance on a value over £50."

In *Hill* v. *London and North Western* (1880) a ram had been destroyed by reason of neglect of the Company. No value was declared, but the usual notice was at back of ticket as to sheep over £2 value. Judge Denman said—"It is impossible to contend that the animal's full value may be claimed without any declaration of value having been made because it happens that in this particular case there has been no contract in writing." County Court Judge's Judgment for £10 was reduced to £2.

IN RESPECT TO A SPECIAL CARRIER, WHEN CARRYING UNDER A SPECIAL CONTRACT, BEING REQUIRED TO CARRY "SAFELY AND SECURELY."

	Case No.		Case No.
Latham v. *Rutley* (1823) ...	198	*Austin* v. *M. S. & L.* (1851) ...	737
Shaw v. *Y. & N. M.* (1849) ...	736	*Kendall* v. *L. & S. W.* (1872) ...	743
Marshall v. *Y. N. & B.* (1851) ...	476		

DIGEST.

In *Latham* v. *Rutley* (1823) a parcel of bank notes, London to Dover, was stolen out of the carrier's office in London, the door being left open. The contract proved was to carry and deliver "safely," fire and robbery excepted. On appeal, Chief Justice Abbott held the carrier not liable, and reversed the decision of the Jury, who gave in favour of Plaintiff.

In *Shaw* v. *Y. & N. Mid.* (1849) a horse was killed owing to a defective partition in a horse-box having become loose. A special contract was made by the printed notice on ticket. Chief Justice Lord Denman held that Plaintiff's declaration that the Company received the horse *to be safely and securely carried* was disproved by the special contract. "It may be, however, that notwithstanding the terms of the contract, the Plaintiff might have alleged that it was the duty of the Company to have furnished proper and sufficient carriages, and that the loss arose from a breach of that duty."

In *Austin* v. *Manchester Sheffield and Lincolnshire* (1851) seven horses were injured from a hot axle, the truck being thrown out of position on the train. A special contract was signed. During stoppage at a station Plaintiff requested that the horses should be taken out of the truck, owing to the hot axle. This was not done. Judge Patteson, on appeal, said—"The gist of the complaint is not simply breach of the ordinary duty of a common carrier, nor of that arising on the

special contract, *but negligence* in persisting to go on with the insufficient truck after notice and request. But I cannot agree to this. The breach must arise by virtue of *contract* or *duty*." Judgment for Company.

In *Marshall* v. *Y. N. & B.* (1851) the portmanteau of a servant, who was travelling with his master, had been lost. Lord Chief Justice Jervis held—"There may still be a duty imposed upon the Company to carry 'safely,' notwithstanding they are not insurers."

In *Kendall* v. *London and South Western* (1872), where a horse was injured, Baron Pigott said—"Since the case of *M'Manus* v. *Lancashire and Yorkshire*, there is no distinction in 'safely' carrying between live animals and merchandise."

WHAT HAVE BEEN HELD TO BE "JUST AND REASONABLE" CONDITIONS, UNDER THE ACT OF 1854, FOR A CARRIER TO MAKE ON AGREEING WITH HIS CUSTOMER TO ACCEPT A LOWER RATE WHEN RELIEVED OF INSURANCE LIABILITY.

	Case No.		Case No.
Simon v. *G. W.* (1856)	165	*Aldridge* v. *G. W.* (1864)	14
Pardington v. *S. W.* (1856) ...	704	*Lord* v. *Midland* (1867)	149
White v. *G. W.* (1857)	147	*Rooth* v. *N. E.* (1867)	686
Lewis v. *G. W.* (1860)	167	*Lewis* v. *G. W.* (1877)	172
Beal v. *South Devon* (1860) ...	148	*Haynes* v. *G. W.* (1879)	173
Harrison v. *L. B. & S. C.* (1862)	99	*Ashenden* v. *L. B. & S. C.* (1880)	101

DIGEST.

In *Simon* v. *Great Western* (1856) Chief Justice Jervis held that, in respect to a special contract for carriage of furniture, "I think that the condition based upon the mileage rate, in proportion to the risk incurred, is 'just and reasonable.'" The condition was—

(Part of Company's Condition 14). "Goods conveyed at a special or mileage rate must be loaded or unloaded by the owners or their agents, and the Company will not be responsible for any risk of stowage, loss, or damage, however caused; nor for any discrepancy in the delivery, as to either quantity, number, or weight; nor for the condition of articles so carried; nor for detention or delay in the conveying or delivery of them, however caused."

In *Pardington* v. *South Western* (1856) ten cattle, loaded in a salt van, were smothered; the pin of lid of van did not prevent the lid closing down. A special contract note was signed. Chief Baron Pollock, on appeal, held the Company not liable, and the following condition "just and reasonable":—

"The Company is to be held free from all risk or responsibility in respect of any loss or damage arising in the loading or unloading, from suffocation, or from being trampled upon, bruised, or otherwise injured in transit, from fire or from any other cause whatsoever."

In *White* v. *Great Western* (1857) cheeses arrived too late for market. Sender signed a special contract. Justice Cresswell held the following condition reasonable:—

"The Company will not, under any circumstances, be liable for loss of market or other claim arising from delay or detention of any train, whether at starting, or at any of the stations, or in the course of the journey."

In *Lewis* v. *Great Western* (1860) consignee, after having received goods for twelve days, then found a bag, in which had been packed clothes, contained empty corn sacks. Chief Baron Pollock, on appeal, held the Company's conditions that had been signed by Plaintiff reasonable, viz.:—

"That no claim for deficiency, damage, or detention would be allowed unless made within three days after delivery of the goods, nor for the loss unless made within seven days of the time they should have been delivered."

In *Beal* v. *South Devon* (1860) the action was for late delivery of sprats in London—at 10 a.m. instead of 6 a.m. Plaintiff had signed the owner's risk rate, where the Company denied liability for a loss of market. Baron Bramwell said—"It seems to me that the Company's stipulation is most reasonable, that the Company should not be liable for loss of market. Reasonableness is a relative term. Reasonableness is not a question of law, but a mixed question of law and fact, depending upon the particular circumstances of each case. Sender may say, 'I am content that you should not be insurers if you will make a less charge;' surely that would determine the question whether the contract was reasonable or not."

In *Harrison* v. *London Brighton and South Coast* (1862) a dog escaped from the train without any neglect or default of the Company. Sender signed a special contract. Chief Justice Erle, in the Queen's Bench, held the following condition "just and reasonable":—

"The Company will not be liable in any case for loss or damage to any horse or other animal above the value of £40, or any dog above the value of £5, unless a declaration of its value, signed by the owner or his agent at the time of booking, shall have been given to them; and by such declaration the owner shall be bound, the Company not being in any event liable to any greater amount than the value so declared. *The Company will in no case be liable for injury to any horse or other animal, or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness.* If the value of any horse or other animal exceed £40, or any dog £5, the price of conveyance will, in addition to the regular fare, be after the rate of £2 10s., or 6d. in the pound upon the declared value above £40, whatever may be the amount of such value, for whatever distance the horse or other animal is to be carried."

In *Ashenden* v. *London Brighton and South Coast* (1880), however, Justice Hawkins held the above condition in italics "*unreasonable*," feeling bound by *Peek* v. *North Staffordshire*, tried in 1863, one year after the trial of *Harrison* v. *London Brighton and South Coast*. The case involved the loss of a dog, and the facts were much the same.

In *Aldridge* v. *Great Western* (1864) it was a case where empty packages, carried *free*, were lost beyond the line of the first or receiving Company, one of whose conditions was as follows:—

"The Company will not be answerable in respect of goods destined for places beyond the limits of the Company's railway, and as respects the Company their liability will cease when such goods shall have been delivered over to another carrier in the usual course of further conveyance. Any money which may be received by the Company as payment for the conveyance of goods beyond their own limits will be so received only for the convenience of the senders, and for the purpose of being paid to the other carrier."

Chief Justice Erle said—"We are of opinion this condition is legal, and does protect the Company. The Company do not thereby attempt to protect themselves from injuries or delay happening *on their own line*, or through the negligence of themselves or their own servants, or even on a further line, where they have received any compensation for carriage on that further

line. The Company receive the money for the purpose of being handed over to the further carrier. To stipulate that under these circumstances they shall not be responsible for loss or delay on the further line seems to me 'just and reasonable.'"

In *Lord* v. *Midland* (1867) dead meat, carried by a train due in London at 12.15 in the early morning, was from three and a half to nine and a half hours late, and the meat missed the Newgate market. Sender signed a special contract note. Chief Justice Bovill, in giving Judgment for Company, held the following condition to be reasonable:—

"Fruit, fish, meat, poultry, game, and any other perishable articles not taken away, or not paid for within six hours after arrival, if directed to be kept till called for or to the like effect, or not directed at all, or directed to a place not known by the Company's agents or servants, or refused by the person or at the place to whom or where directed, may be forthwith sold, without any notice to the sender or consignee, for the benefit of all concerned, by auction or otherwise, and payment or tender of the net proceeds of any such sale, after deduction of freight charges and expenses, shall be accepted as equivalent to delivery; and the Company in the declaration mentioned, here delivered, will not be responsible for any damage to any such articles on the ground of loss of market, provided the same be delivered within a reasonable time after the arrival thereof at the station from whence the delivery was made."

In *Rooth* v. *North Eastern* (1867) the following was a condition of the carriage of the cattle:—

"The bearer undertakes the risk of loading, unloading, and carriage, whether arising from the negligence or default of the Company or their servants, or from defect or imperfection in the station, platform, or other place of loading or unloading, or of the carriage in which they may be conveyed, or from any other cause whatsoever."

There was insufficient cattle-landing accommodation, and only one truck of cattle could be unloaded at a time; and while the cattle from the second truck were being unloaded, the cattle out of the first waggon got on to the line and were killed. Judgment was against the Company. No alternative rate was offered to the sender. Chief Baron Kelly held, that if such alternative rate were offered, "I am not prepared to say that the provision that the owner undertakes all risk of loading and unloading would be in itself unreasonable."

In *Lewis* v. *Great Western* (1877) Lord Justice Bramwell, in Court of Appeal, held the following conditions reasonable, and confirmed the Judgment for the Company:—

"The Great Western Railway Company hereby give notice that they have two rates for the conveyance of certain articles—one the ordinary rate, when they take the liability of the carrier; the other a reduced rate, adopted when the sender relieves them of all liability of loss, damage, or delay, except upon proof that such loss, damage, or delay arose from '*wilful misconduct*' on the part of the Company's servants.

"To the Great Western Railway Company, —— Station. ——, 187 . Receive and forward the —— undermentioned goods, to be carried at the reduced rate below the Company's ordinary rate, in consideration whereof I undertake to relieve the Great Western Railway Company, and all other Companies over whose lines the goods may pass, from all liability in case of damage or delay, except upon proof that such loss, detention, or injury arose from 'wilful misconduct' on the part of the Company's servants. I also agree to the conditions and regulations on the back of this note."

In *Haynes* v. *Great Western* (1879) Justice Grove held the following condition to be a "reasonable condition":—

"I undertake to relieve the Great Western Railway Company, and all other Companies over whose lines the goods may pass, . . . from all liability in case of damage, . . . except upon proof that the injury arose from the 'wilful misconduct' of the Company's servants."

WHAT HAVE BEEN HELD TO BE "UNJUST AND UNREASONABLE" CONDITIONS, UNDER THE ACT OF 1854, FOR A CARRIER TO MAKE ON AGREEING WITH HIS CUSTOMER TO ACCEPT A LOWER RATE WHEN RELIEVED OF INSURANCE LIABILITY.

	Case No.		Case No.
Simon v. *Great Western* (1856)...	165	*Aldridge* v. *Great Western* (1864)	14
Dunham v. *L. & N. W.* (1856) ...	146	*Allday* v. *Great Western* (1864)...	683
M'Manus v. *L. & Y.* (1859) ...	739	*Gregory* v. *W. M.* (1864)	699
Garton v. *B. & E.* (1861)	321	*Kirby* v. *Great Western* (1868)...	688
M'Cance v. *L. & N. W.* (1861) ...	740	*Doolan* v. *Midland* (1877)... ...	702
Lloyd v. *W. & L.* (1862)	741	*Ashenden* v. *L. B. & S. C.* (1880)	101
Peek v. *North Staffordshire* (1863)	168		

DIGEST.

In *Simon* v. *Great Western* (1856) Chief Justice Jervis

held that the following condition was "unjust and unreasonable":—

"Nor for loss, detention, or damage of any package insufficiently packed, marked, directed, or described, or containing a variety of articles liable to damage each other."

The action was for damage to furniture, and the Chief Justice said—"Because it seeks to relieve the Company from a loss by reason of insufficient packing, it being quite immaterial whether the goods are properly packed or not if the whole package is lost; and they rely on that as the ground of relief."

In *Dunham* v. *London and North Western* (1856) delay to dead meat, tried conjointly with *Simon* v. *Great Western*, Chief Justice Jervis found the following conditions "unjust and unreasonable," although signed by sender:—

"*London and North Western Railway.—Park Lane Station, December* 19, 1855.—Hay and straw, furniture, glass, marble, china, eastings, and other brittle and hazardous articles, &c., conveyed at the risk of the owners. To be forwarded from Liverpool to London at owner's risk.—R. C. DUNHAM."

The case was referred back to the Judge of the County Court for the circumstances under which the contract was entered into, and no further report is given. Case was probably compromised.

In *M'Manus* v. *Lancashire and Yorkshire* (1859) the damage to three horses arose from a hole being made in the bottom of the truck, and the following "special condition," duly signed, was held by the Court of Exchequer Chamber "unjust and unreasonable" in respect to exempting Company from liability:—

"This ticket is issued subject to owners undertaking all risks of conveyance, loading, and unloading whatsoever, as the Company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling on the Lancashire and Yorkshire Railway or in their vehicles."

In *Garton* v. *Bristol and Exeter* (May 3, 1861) the Court held the following condition on Company's consignment note "unjust and unreasonable," and the Company cannot insist upon senders signing such conditions:—

"That the Company should not be liable for the loss, detention, or damage of any package insufficiently packed."

In *M'Cance* v. *London and North Western* (1861) horses were injured from defective state of bottom of waggon, and Baron Bramwell held the following condition unreasonable, and the Court bound by *M'Manus* v. *Lancashire and Yorkshire* :—

"And in consideration of the rate charged for conveyance of such horses, I hereby agree that the same are to be carried entirely at the owner's risk."

In *Lloyd* v. *Waterford and Limerick* (1862), horses delayed and injured, sender was offered two rates :—Condition A—Lower rate, owner's risk, Company to be exempt from all liability; condition B—Company's risk. The Company would not be liable for injury unless pointed out to the Company's agent at the time of unloading. The Court of Queen's Bench (Ireland) held condition A unreasonable, and condition B also unreasonable, from Plaintiff being obliged to point out at the time of unloading the injuries the animals might have sustained.

In *Peek* v. *North Staffordshire* (1863) the sender wrote —"Please forward the three cases of marbles not insured to W. Peek, Esq., to be called for at Camden Town Station, London." The damage arose from wet. The Lord Chancellor said—"The Act (1854) expressly states that any condition having for its object to relieve the Company from liability occasioned by the neglect or default of such Company shall be null and void." If the present condition had been embodied in a contract, it would then exempt the Company from responsibility for injury, however caused, including, therefore, gross negligence, and even fraud or dishonesty, on the part of the Company's servants. I am of opinion that this is a condition which it would have been the duty of a Court or Judge to hold to be neither just nor reasonable."

In *Aldridge* v. *Great Western* (1864), liability for safe transit of empty packages, the Company's condition notice was :—

"The Company will not be answerable for the loss or detention of, or

damage to, wrappers or packages of any description charged by the Company as empties."

Chief Justice Erle said—"We are by no means prepared to accede to the suggestion that because no charge is made for the return of the empty packages therefore the Company necessarily convey them gratuitously. The Company may be justly considered as having had the carriage of the empties prepaid in the shape of the previous payment for the carriage of the same packages when full including an obligation on the Company to carry the empties back without further charge."

In *Gregory* v. *West Midland* (1864) damage arose to a cow, and the truck, it was admitted, was not a proper truck; and the following condition in a signed special contract ticket was held insufficient to exempt the Company:—

"That the sender is required to see to the efficiency of the waggon before he allows his stock to be placed therein, and defects pointed out in writing before the train leaves the station."

Chief Justice Pollock said—"If the case of *M'Manus* v. *Lancashire and Yorkshire* had been undisturbed by the Court of Error, I should have now thought the Company entitled to our Judgment in this case.

In *Allday* v. *Great Western* (1864) the following conditions in the special contract were held unreasonable:—

"Received from Allday the undermentioned animals, on the conditions stated below, and at special *reduced charge* below the rates authorised by law; the loading and unloading to be performed by the sender, and any assistance voluntarily given by the Company's servants to be at the risk of the owner. The Company are not to be subject to any risk in receiving, loading, forwarding, or transit and unloading, nor to be amenable for any damage, actual or consequential, arising from suffocation, from being trampled on, bruised, or otherwise injured, from fire or any cause whatsoever, nor for any consequences arising from overcarriage, detention, or delay in or in relation to the conveying or delivery of the said animals, however caused. The Company is not bound to send the animals by any particular train, or to carry or deliver them within any certain or definite time, or in time for any particular market. If, on the arrival of the cattle or other animals at their destination, no one shall be ready to receive the same on behalf of the consignee, the Company will, at the discretion of the superintendent of any station, send such animals into yards or other convenient places, and at the expense and risk of the sender or consignee, and, if not claimed within seven days, the same will be sold to defray expenses and

pay charges. In order to guard against disappointment, the public are recommended to give two clear days' notice of their intention to send cattle from any station, so that the Company may, if possible, provide trucks; and, to afford time for receiving and loading such cattle and stock, they shall be at the station not less than two hours before the departure of the train by which they are intended to be conveyed. N.B.—The conditions cannot be altered or dispensed with by any person whomsoever."

Chief Justice Cockburn said—"The Company claim absolute immunity from all injury arising from delay caused by their own negligence. This I take to be an unreasonable condition. The condition (as it stands) is on the face of it unreasonable." The cattle had been overcarried and delayed, and consequently damaged.

In *Kirby* v. *Great Western* (1868) cattle loaded on a Monday afternoon did not get to their destination until Wednesday, and were damaged by the delay. Owner's risk note was signed. Baron Martin said—"The particular condition (as to delay) has been held unreasonable in *Allday* v. *Great Western*, which I am bound to follow. As to the conditions of the special contract, my opinion is well known—that the conditions must be treated as a whole, and if one part is unreasonable the whole is bad. If Railway Companies will persist in inserting conditions which have been condemned by the Courts they must take the consequences." In *Simon* v. *Great Western* Chief Justice Jervis, in giving Judgment, where there were two conditions, held one to be good and the other to be bad.

In *Doolan* v. *Midland* (1877) Lord Blackburn, in the House of Lords, held the following condition "unreasonable." It was a case where cattle had been lost in the wreck of the "St. Columba," and the Jury found the loss arose by the negligence of the crew, and not by any peril of the sea:—

"Improper, careless, or unskilful navigation, or any default or negligence of the master or any of the officers or crews of the Company's vessels."

In *Ashenden* v. *London Brighton and South Coast* (1880) the following condition was held to be "unjust and

unreasonable," no alternative or optional rate being offered to sender. It was a case of a dog being lost that had slipped its collar:—

"The Company will in no case be liable for injury to any horse or other animal, or dog, of whatever value, where such injury arises wholly or partially from fear or restiveness."

The Brighton County Court Judge held the conditions to have been "unjust and unreasonable," but according to *Dunham* v. *London and North Western* no County Court Judge has power to determine such a point. Justice Hawkins, in Exchequer Court, held that "it was clear the condition was framed to cover every loss, even though occasioned by the wilful misconduct of the Company's servants, without, as in the case of *Lewis* v. *Great Western*, giving sender an optional rate. If the Company had stipulated 'that they would not be responsible for loss resulting from mere accident, without neglect or default,' such restriction of their common law liability would have been both just and reasonable."

WHERE DROVERS' PASSES WERE ISSUED FOR DROVERS TO ACCOMPANY CATTLE: BUT THE DROVERS DID NOT ACCOMPANY THE CATTLE, AND THE COMPANY WERE HELD NOT LIABLE FOR ERRORS, DAMAGES, OR LOSSES.

	Case No.		Case No.
Allen v. *L. & Y.* (1870)	726	*Brady* v. *City of Dublin Co.* (1871)	727

DIGEST.

In *Allen* v. *Lancashire and Yorkshire* (1870) a cow was exchanged for an inferior one at the unloading in Liverpool. Baron Hughes held the Company not liable, as the drover, who had a pass, did not travel with the cattle.

In *Brady* v. *City of Dublin Company* (1871) a pig was found short on the pigs being sorted in Liverpool. The Dublin Recorder held the Company not liable, as the drover, who had a pass, did not travel with the pigs.

A SPECIAL CONTRACT DOES NOT EXEMPT A CARRIER FROM LIABILITY WHEN HE DELIVERS THE GOODS TO A WRONG CONSIGNEE.

	Case No.		Case No.
Wyld v. *Pickford* (1841)	82	*Goldsmith* v. *G. E.* (1881)	153
Hoare v. *G. W.* (1877)	238		

DIGEST.

In *Wyld* v. *Pickford* (1841) there had been a misdelivery and damage to maps, valued at £200, but which sender refused to insure, and Pickford carried on a notice that he would not be responsible for the loss of or damage to unless they were insured. The Court held the carrier, notwithstanding this notice, as bound to take ordinary care in the conveyance, and as liable, not only for a total abandonment of his character or wilful negligence, but also for a conversion by misdelivery which has arisen from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care.

In *Hoare* v. *Great Western* (1877) 140 sacks pollard were delivered by the station-master at Pewsey to Jarvis, when consigned to Jeeves. Lord Coleridge said—"He deliberately gave up the goods to the wrong person without making any inquiry, and that amounts to 'wilful misconduct;' and it is not the less wilful misconduct because it is also gross negligence, and I hold the Company liable." The usual special contract had been duly signed. This case was held to form a precedent, which was followed in the case of *Goldsmith* v. *Great Eastern*, where two bags clover seed, carried under a special contract, were delivered to the wrong consignee.

WHERE THE CARRIAGE IS PARTLY BY SEA AND PARTLY BY LAND.

	Case No.		Case No.
31 & 32 *Vic., cap.* 119, *sec.* 14.		*Moore* v. *Midland* (1875)	701
Pianciani v. *L. & S. W.* (1856)...	470	*Doolan* v. *Midland* (1877)... ...	702
Le Conteur v. *L. & S. W.* (1865)	479	*Cohen* v. *S. E.* (1877)	473
Baxendale v. *G. E.* (1869)	66		

DIGEST.

31 & 32 *Vic., cap.* 119, *sec.* 14 (1868).—Where a Company by through booking contracts to carry any animals, luggage, or goods from place to place, partly by rail and partly by sea, or partly by canal and partly by sea, a condition exempting the Company from liability for any loss or damage which may arise during the carriage of such animals, luggage, or goods by sea from the act of God, the King's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the Company gives for such animals, luggage, or goods, be valid as part of the contract between the consignor of such animals, luggage, or goods and the Company, in the same manner as if the Company had signed and delivered to the consignor a bill of lading containing such condition. For the purposes of this section the word "Company" includes the owners, lessees, or managers of any canal or other inland navigation.

In *Pianciani* v. *London and South Western* (1856) a portmanteau, passenger's luggage, containing silks, furs, and lace, was lost between London and Jersey. Its value, £2,500, was not declared. The Court of Common Pleas held that the through contract was divisible, and that the Carriers' Act protected the Company for the land journey.

In *Le Conteur* v. *London and South Western* (1865) a chronometer put in a carriage was stolen before the train left. The passenger was booked, London to Jersey and back. Chief Justice Cockburn held that "this case was controlled by that of *Pianciani* v. *South Eastern*, in which case the Court of Common Pleas expressed a strong opinion that the contract in such a case was divisible (the land and sea journey), and that, as far as regarded the conveyance in this country, it would afford the Company a protection under the

Carriers' Act. I entirely concur in the view there taken." Judgment for Company.

In *Baxendale* v. *Great Eastern* (1869) a case of pictures had been lost between Rotterdam and London, *via* Harwich; value £84. The case was received at Rotterdam on a *Bill of Lading*, and no declaration of value was made. The contention was that carrying under a bill of lading, partly by sea and partly by land, constituted a special contract, and that the Company were water and not common carriers, and could not be exempt by favour of Carriers' Act (value over £10). The Exchequer Chamber held that the Company were protected, as section 6 of Carriers' Act says nothing in the Act "shall extend or be construed to annul or anywise affect any special contract between a common carrier and any other parties for the conveyance of goods."

In *Cohen* v. *South Eastern* (1877) a trunk, value £73, fell into the sea at Folkestone Harbour. Lord Justice Mellish, in Court of Appeal, held that the Company's notice did not protect them, as by section 7, Railway and Canal Act, such notices were null and void. The contract to carry the passenger was made at Boulogne, but it was held that the last clause of section 16 of Act (1868) applied, viz.:—"The provisions of the Railway and Canal Act, 1854, so far as the same are applicable, shall extend to steam vessels and to the traffic carried thereby." It appeared that under French law the Company would have been also liable.

In *Doolan* v. *Midland* (1877) cattle were lost in the wreck of "St. Columba," and the Jury found the ship was lost by negligence of the crew, and not by any peril of the sea. A risk note was signed. Lord Blackburn, in House of Lords, held that the whole of the Railway and Canal Act, 1854, extends to the traffic on steamboats a railway company may *own* or *work*, and the Act (1871) *extends this* to "steam vessels and the traffic carried thereby." This makes section 7 of Act (1854) rule the case, and in *Peek* v. *North Stafford-*

shire it was held that under that section a Company could not by special contract exempt itself from *negligence.*

In *Moore* v. *Midland* (1875), which was, like the case of *Doolan* v. *Midland*, for cattle lost in the "St. Columba," the same decision had been previously given by the Court of Common Pleas, Ireland.

JURY TO BE TOLD AS TO SPECIAL CONTRACT.

	Case No.		Case No.
Crisp & Thompson v. *Y. & N. Mid.* (1854)	675	*Hughes* v. *G. W.* (1854)... ...	676

DIGEST.

In *Hughes* v. *Great Western* (1854) pigs were delayed, and sender had signed a special contract note. The Assize Judge non-suited Plaintiff. On the appeal case, Chief Justice Jervis said—"It is quite clear that the pigs were not received on the terms stated in the declaration, and the Judge ought to have told the Jury to find for the Company on the plea setting up the contract."

In *Crisp & Thompson* v. *Y. & N. Mid.* (1854) cattle were delayed. Sender accepted the cattle ticket, with a special condition at back. The County Court Judge left the question to the Jury, whether the Company accepted the cattle as common carriers, or under a special contract. The Chief Justice, on appeal, held that it was misdirection to leave the point of contract to the Jury; he (County Court Judge) gave the Jury an opportunity of deciding against the Company contrary to law, and they did so. Judgment reversed, and in favour of Company.

WHERE THE WORDS "OWNER'S RISK" ARE INSERTED ON SENDER'S CONSIGNMENT NOTE, AND NO REGULAR FORM OF CONTRACT DOCUMENT PASSES BETWEEN CARRIER AND SENDER.

	Case No.		Case No.
Malcolmson v. *G. S. & W.* (1860)	166	*Lewis* v. *G. W.* (1877)...	172

DIGEST.

In *Malcolmson* v. *Great Southern and Western* (1860) the consignment note, upon which was written "Owner's risk," had been read over and explained to sender's porter, who affixed his mark, duly witnessed. Justice Keogh, at the Carlow Assizes, said—"Provided sender expressly contracts with the Company; but the mere words 'Owner's risk,' to which sender's man affixed his mark, was not such a special contract to release the Company from all risk" (of breakage of a papier-maché fragile chair). The report makes no mention of an optional rate.

In *Lewis* v. *Great Western* (1877) the consignment note was sender's own form, with the remark "Owner's risk," and the counterfoil which the Company signed bore the same words—"Owner's risk." Sender was examined, and admitted he was in the habit of sending goods at the owner's risk rate, and was aware of the Company's conditions. The note was signed, "From W. J. Hutchinson." Lord Justice Bramwell, in Court of Appeal, held that the contract, as set out in sender's consignment note, was sufficient.

HORSES, CATTLE, OR DOGS LOST OR INJURED FROM FEAR, RESTIVENESS, OR INHERENT VICE.

	Case No.		Case No.
Stuart v. *Crawley* (1818)	98	*Kendall* v. *L. & S. W.* (1872)...	743
Chippendale v. *L. & Y.* (1851)...	698	*G. W.* v. *Blower* (1872)	700
Harrison v *L. B. & S. C.* (1862)	99	*Gill* v. *M. S. & L.* (1873)	728
Moffatt v. *G. W.* (1867)	742	*Ashenden* v. *L. B. & S. C.* (1880)	101
North E. v. *Richardson* (1871) ...	100		

DIGEST.

In *Stuart* v. *Crawley* (1818) a dog was accepted by the Grand Junction Canal Company to carry, with only a

string tied round his neck. The dog was tied up in a watch-house, but he got away. Lord Ellenborough held that the Company had the means of seeing that the dog was insufficiently secured, and as they accepted him so, they were liable.

In *Chippendale* v. *Lancashire and Yorkshire* (1851) three heifers got out of a cattle truck, through a space between the close boarding at the lower part of the side of the truck and a rail which ran round the top of the truck. Special contract was signed. Justice Coleridge held that the Plaintiff was not entitled to maintain this action, and that by the terms of the ticket it is to be understood that the Plaintiff took upon himself all risk whatever of damage to the animals during the journey, and that the Company are fully protected.

In *Harrison* v. *London Brighton and South Coast* (1862) a dog, valued at £21, escaped from the train during transit, without any neglect or default of the Company. The Company relied on their risk note as to value over £5, which sender had signed (see case for condition). Chief Justice Erle, in the Queen's Bench, held the special condition reasonable, and the Company exempt from liability for any compensation.

In *Moffatt* v. *Great Western* (1867) a mare had been loaded in a horse-box, and before the truck had been put on the train the mare got strangled. She was tied with two ropes of three feet and two feet long. Plaintiff contended that the ropes should not have exceeded eighteen inches. The Judge pointed out to the Jury that the viciousness of the animal was a question for them to decide. The Jury gave a verdict against the Company.

In *North Eastern* v. *Richardson* (1871) a dog in transit was, at Kirby Stephen (where a change of train occurred), tied up by the strap to a spout on platform. The dog slipped its collar, and was killed. Justice Willes held the Company not liable, contrasting the case of *Stuart* v. *Crawley*—"Here (*North*

Eastern v. *Richardson*) the dog was delivered with a collar and a strap, which clearly indicated that the proper mode of securing the animal was by these." The Company gave no ticket when they received the dog.

In *Great Western* v. *Blower* (1872) a bullock escaped out of a truck in transit, and was killed. Judge Willes held that the accident was caused by some inherent vice in the bullock, and no carrier is obliged to have a new carriage for every journey, and merely suggesting that there might be a better truck is not sufficient to meet such findings.

In *Kendall* v. *London and South Western* (1872) a horse was loaded with saddle upon it, and the stirrups hanging down. The horse was severely injured. Baron Bramwell said—"There is no doubt the horse was the immediate cause of its own injuries. It slipped, or fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities—'its proper vice,' that is to say—from fright or temper, or struggling to keep its legs, the Company are not liable. If from the Company's negligence, it would be otherwise." Judgment for Company.

In *Gill* v. *M. S. & L.* (1873) a restive cow was let out of a cattle truck. Plaintiff said to the porter—"Don't let that cow out; if you do, she will go slap at you." The porter said—"Close the gate." Plaintiff said—"I shall go outside," and did so. The cow, let out, rushed up and down the cattle platform in a wild state, jumped over the rails of a pig pen on to the line, ran into the tunnel, and was killed. Justice Lush, on appeal, held the Company's notice as to restive cattle did not protect them, and that the mischief was attributable to the porter, who, against the Plaintiff's advice, let out the cow before she had been quieted.

In *Ashenden* v. *London Brighton and South Coast* (1880) a greyhound, valued at £10, slipped its collar when being transferred at Beckenham Junction, ran down

the line, and was lost. One condition of the ticket was—"The Company will in no case be liable for injury to any horse or other animal, or dog, of whatever value, where such injury arises wholly or partially from fear or restiveness." Justice Hawkins held this condition unreasonable, and gave Judgment for Plaintiff, feeling bound by *Peek* v. *North Staffordshire*, tried in 1863, one year after *Harrison* v. *London Brighton and South Coast.* (If the condition had been simply "that the Company would not be responsible for any dog that slipped its collar," it is most probable they would have been freed from liability.)

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98. *Stuart* v. *Crawley.*—Action for value of a greyhound that slipped his collar and was lost. The Grand Junction Canal Company accepted the dog to carry from London to Harefield Lock. The Company's book-keeper accepted the dog with a string tied round his neck, and he was so tied up in a watch-box; in half an hour he was not to be found. The Company pleaded the dog had not been delivered in a state of security; there was no collar about his neck, but only a cord; that it was similar to the delivery of goods imperfectly packed, where the loss arises from want of care on part of owner. Lord Ellenborough held the Company were responsible; they accepted the dog, and gave a receipt for same. The case was unlike goods imperfectly packed, since in such case the defect was not visible; but in this case the Company had the means of seeing that the dog was insufficiently secured.—*Tried at Nisi Prius, before Lord Ellenborough*, 1818.—*From Starkie's Reports, vol.* 2, *page* 323.

99. *Harrison* v. *London Brighton and South Coast Railway Company.*—Action for £21 for a dog that escaped from the train during transit, without any neglect or default on the part of the Company, London to Worthing. The case was tried in the Court of Queen's Bench, May 29, 1860, and November 27, 1861, and a verdict given for Plaintiff. The Company appealed to the Exchequer Chamber, of which this is an abstract report. The Plaintiff paid 3s. carriage, and signed the following risk note:—

"The Company will not be liable in any case for loss or damage to any

horse or other animal above the value of £40, or any dog above the value of £5, unless a declaration of its value, signed by the owner or his agent at the time of booking, shall have been given to them; and by such declaration the owner shall be bound, the Company not being in any event liable to any greater amount than the value so declared. The Company will in no case be liable for injury to any horse or other animal, or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed £40, or any dog £5, the price of conveyance will, in addition to the regular fare, be after the rate of £2 10s., or 6d. per pound upon the declared value above £40, whatever may be the amount of such value, for whatever distance the horse or other animal is to be carried."

The Plaintiff made no declaration of value. Chief Justice Erle said—"The Company profess to carry dogs, and are therefore common carriers of dogs. They likewise profess their liability for dogs over £5 value is limited, that if the excess over £5 value be not declared and paid for the Company will not be liable. The loss of the dog occurred from pure accident, and was not occasioned by any neglect or default on either side. The Judgment of the Court below was for Plaintiff; but upon error, I am of opinion that it ought to be reversed. If the case had occurred before the Railway and Canal Traffic Act, 1854, the Company would have been entitled to succeed, being exempt from liability for loss by the terms of their contract. See *Austin* v. *Manchester Sheffield and Lincolnshire Railway*; also *Carr* v. *Lancashire and Yorkshire Railway*. Then is the defence which would have existed before that Act defeated thereby? I think not. (1) The 7th section of that Act has no application to this case. (2) If the statute has application, the condition in the contract was just and reasonable. The 7th section is confined to losses and injuries occasioned by misconduct by Company, and not occurring through pure accident. The enactment runs—

"'Every Railway and Canal Company shall be liable for the loss of or injury to any horse or thing in the carrying thereof occasioned by the neglect or default of such Company, notwithstanding any condition, &c., made by such Company to the contrary thereof or limiting such liability, every such condition, &c., being hereby declared void.'

"Then follow provisoes. The section declares that the Company shall be liable for the loss of an animal occasioned by the neglect or default of the Company, and if the loss was not so occasioned the section has no application. Neglect or default would express culpable conduct. If intended to pro-

vide for all loss, however occasioned, the words, 'loss occasioned by neglect or default of the Company,' would have no meaning or operation. Although in each case the Company only sought to apply the condition reasonably, the Courts held that they claimed to be irresponsible for negligence, however gross, or misconduct, however flagrant (see *M'Manus* v. *Lancashire and Yorkshire Company*); and these decisions created a panic lest the Companies should inflict wilful injury and claim immunity. The contest was whether the Companies ought to be exempt from liability for such damage if caused by their culpable conduct. The section, if rightly construed, is to take away that exemption, and no more. It is provided that nothing contained in the statute shall prevent Companies from making such conditions as a Court or Judge should adjudge to be just and reasonable. If the Companies sought to apply the condition 'unreasonable' to justify wilful misconduct, the Judge would be best qualified to decide thereon. Contracts by Railway Companies, applicable to all customers, must be expressed in wide terms capable of application to a countless variety of occasions. By one proviso the liability for negligence thus created by compulsion is limited to a maximum of value, unless the customer pays a premium for insuring a higher value. By another proviso the burden of proving the value is thrown on the customer; by another the rights and liabilities created by the Carriers' Act are preserved. The Act may be defective, perhaps, in omitting any attempt to define the culpable conduct intended in the terms 'neglect or default;' but it introduces no anomaly in the law relating to railways before the decision in *M'Manus's Case* introduced what I pray leave to call semi-paralysed contracts, valid for the one party, but contingently void towards the Railway Company. Any contractor with a Railway Company concerning traffic may break his promise with impunity if the Judge who tries thinks it reasonable to allow it; that, owing to the monopoly Railway Companies have, they shall not possess the same power which other individuals have of entering into contracts without restraint. Then does the section enact that *all* the contracts of Railway Companies relating to traffic may be declared void if the Judge, at the close of the litigation, thinks them unrea-

sonable? I submit that it does not. I cannot find any words in the section approximating in the slightest degree to express such an intention. But, after the Judgments that have been given, I am bound to assume that there are words capable of being construed in the sense contended for by the Plaintiff. It is said that all power of making contracts absolutely binding should be taken away, because Railway Companies are supposed to have great capital, and to have a monopoly of transit. I submit that Railway Companies have no monopoly. They are subject to external competition among each other; they are also subject to internal competition by rival carriers making them carry, and taking from them a part of the profit arising from such carriage. If railways are so convenient to travellers in haste (to make contracts by signing any paper put before them) that they require to be controlled, the same reason does not apply to canal navigation, where there is neither monopoly nor speed, and yet the 7th section applies to Canal Companies as well as to railways; for as no infant can bind himself except as far as the contract is for his benefit, so no person can bind himself to a Railway or Canal Company except as far as a Judge shall find the contract just. The anomaly is not striking where the contract relates to 6d. in the pound for a dog; but take such a contract as the Ruabon Coal Company (*Nicholson* v. *Great Western Railway*), where during ten years the Coal Company contract to pay £40,000 a year. If the Railway Company were to sue for the £40,000, did the Legislature intend that the Coal Company should be able to raise the question whether the amount was an unreasonable price, and, if the Judge who happened to try the case thinks so, defeat the claims of the carrier? I submit not. I suggested in *M'Manus's Case* the test of what is just varies with the Judge who has to apply it: one trusts to the common law liability of carriers, another to an intuitive perception, another to the obligation of a promise, another to a knowledge of the management of railways. I submit that a Judge is incompetent to say what justice requires in respect of such questions (*i.e.*, rates and charges as to owner's and Company's risk). Throughout the litigation on this liability of railways, the Companies, according to my observation, have acted fairly; the customers quite the reverse. In this and

other similar actions the Plaintiffs, who had passed their promise to the Company, broke it without scruple, and avowed that they had wrongfully deprived the Company of the premium due to them, and still succeeded in laying a risk on the Companies which they had promised to bear themselves. I am of opinion the statute does not apply to this case, *there being no misconduct*, and that therefore the contract maintains the defence.

"I submit the condition in this case was reasonable and within the statute. The condition is that a customer intending to impose the higher risk on the Company, and withholding the premium which in honesty as well as law is due, is to bear the risk. I submit that the Company had a right to stipulate for exemption from all responsibility except wilful wrong, and that such is the effect of the condition. Barons Keating, Williams, and Channell concur that the Judgment ought to be reversed, and that the condition was just and reasonable."

Baron Wilde strongly dissented from the Judgment of the majority. He thought it unjust and unreasonable that because the dog turned out to be worth more than £5 by the contract, if sanctioned, the owner could recover nothing. He says—"Now it might be reasonable to compel the owner to put a value on his dog, to make him pay a percentage on *that* value as insurance, and to stipulate that in case of loss or injury he should recover no more than the value he had himself fixed; but to visit him with the total loss of his property when he had practised no deception and been guilty of no fault seems to me to be clearly unjust and unreasonable." The Carriers' Act was designed to meet the case of small parcels of value sent by bankers and others where the extent of the value was concealed from view. Judgment for Company.—*Tried at the Court of Queen's Bench, Feb.* 3, 1862.—*From Law Journal Reports, vol.* 31, *page* 13.

100. *North Eastern Railway Company* (*on appeal*) v. *Richardson & Sisson.*—Action for £50 for a greyhound which slipped its collar at Kirby Stephen, and ran down the line, and was killed by a train—Temple Sowerby to Morpeth. The dog was delivered at Temple Sowerby, but no receipt was issued. The dog, when delivered, had round its neck a collar of

leather with a strap, and was clothed with a sheet. At Kirby Stephen there was a change of train, and the dog was taken from the van and tied up by the strap to a spout at the station, waiting the arrival of the forwarding train. The dog slipped its collar, and was killed. The case was first tried before the County Court Judge of Westmoreland, who gave a verdict for Plaintiff for £50. The Company appealed, and on the appeal case Justice Willes said—"The Company in the present case, with reference to the dog in question, were in the position of ordinary bailees, not being common carriers of dogs, and only liable for the loss in the event of negligence on their part, and would not be liable if its loss was by reason of negligence of the person who delivered the dog to the Company. We are clearly of opinion there was contributory negligence of the sender. We think the case of *Stuart* v. *Crawley* very applicable. In that case the dog was tied by a piece of string to a watch-box, where it slipped its noose, and got lost. The carrier was held liable, because he ought to have known better than to fasten a dog of that kind with only a string such as that which was round his neck. Here the dog was delivered with a collar and a strap, which clearly indicated that the proper mode of securing the animal was by these. We are of opinion the Judgment of the County Court cannot be sustained. The Judgment must therefore be reversed; but as the Company gave no ticket when they received the dog, and therefore are not without blame, we think it should be reversed without costs." Judgment for Company.—*Tried in Court of Common Pleas, June* 23 *and* 24, 1871.

101. *Ashenden* v. *London Brighton and South Coast Railway Company.*—Action for £10 for an Italian greyhound, sent from Norwood Junction to Rochester. At Beckenham Junction, in transferring the dog from one train to another, it slipped its collar, ran down the line, and was lost. Sender, on delivery of the dog, signed the usual ticket, but he did not declare the value of the dog. One of the conditions of the ticket specified—"The Company will in no case be liable for injury to any horse or other animal, or dog, of whatever value, where such injury arises wholly or partially from fear or

restiveness." The case was first tried at the Brighton County Court; and the Company contended that, under the conditions signed on the ticket and the Railway and Canal Act, sec. 7, they were only liable for £5. The Judge found the dog was lost without any neglect or default on the part of the Company, but that the conditions on the ticket were unjust and unreasonable, and gave a verdict for £10 10s. The Company appealed, when Justice Hawkins said that "in *Peek* v. *North Staffordshire*, tried in the House of Lords, it was expressly held that a condition exempting the Company from responsibility for injury, however caused, without limitation or exception, was neither just nor reasonable, for such a condition would, if valid, exempt them from liability for loss or damage happening through the grossest and most culpable negligence or wilful misconduct. Had the Company, by their conditions, stipulated, as they easily might have done in a very few words, simply that they would not be responsible for loss resulting from mere accident without neglect or default, such restriction of their common law liability would have been both just and reasonable, and, if embodied in a signed contract, would have protected them against liability for the loss which has here occurred. We are bound to construe the contract as we would have done at the moment it was made, without regard to subsequent events, and, so construing it, it is clear that it was framed to cover every loss, even though occasioned by the wilful misconduct of the Company or their servants. The case of *Lewis* v. *Great Western Railway Company* does not in the least degree militate against this view. There it was held that a contract on the part of the Company to carry cheese at a lower rate than the ordinary rate of carriage, on condition that the Company should not be liable for loss arising from any cause except wilful misconduct of their servants, was a just and reasonable contract, for a consideration in the shape of a lower tariff was offered to the sender of the goods as an inducement to him to limit his common law liability, and he had the option to send his goods at the ordinary rate of carriage, holding the Company to their ordinary liability as carriers, or at a lower rate of carriage, taking upon himself the risk of injury happening to his goods in the course of their

transit through any neglect or default of the Company or their servants not amounting to wilful misconduct." Chief Baron Kelly concurred. Judgment against Company.—*Tried in Court of Exchequer, March* 2 *and* 9, 1880.—*From Law Times Reports, vol.* 42, *page* 586.

STOPPAGE IN TRANSITU.

In case of Bankruptcy, Acceptance of a Bill for Value of the Goods does not take away Sender's Right to Stop the Goods, neither does Part Payment on Account of Goods.

	Case No.		Case No.
Hodgson v. *Loy* (1797)	102	*Feise* v. *Wray* (1802)	103

DIGEST.

In *Hodgson* v. *Loy* (1797) it was held that a sender's right of stopping goods *in transitu* is not taken away by the consignee's having partly paid for the goods; the sender has a right to retake them (in case of bankruptcy) unless the whole price has been paid. (See also *Ex parte Rosevear Clay Company, re* Cock.)

In *Feise* v. *Wray* (1802) it was held that though the trader had, before his bankruptcy, accepted bills drawn on him by his correspondent for the amount of the goods, such acceptances, provable under his commission, amounted at most to part payment for the goods, which does not take away the sender's right to stop *in transitu*.

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102. *Hodgson* v. *Loy*.—Action in respect to stoppage *in transitu*. The goods consisted of firkins of butter, Cumberland to London. Ward became a bankrupt, and his assignee claimed the butter. Ward had made a payment on account of the butter, but had not paid its full price. It was held that a sender's right of stopping goods *in transitu* is not taken away by the consignee's having partly paid for the goods. Lord Chief Justice Kenyon said—"We are clearly of opinion that the circumstance of the consignee having partly paid for the goods does not defeat the sender's right to stop them *in transitu*, the consignee having become a bankrupt, and that the

sender has a right to retake them unless the whole price has been paid.—*Tried in Court of King's Bench, November* 23, 1797.—*From Durnford and East's Term Reports, vol.* 7, *page* 440.

103. *Feise* v. *Wray.*—Action in respect of stoppage *in transitu* of beeswax sent, Hamburgh to London.

A trader in London gives an order to his correspondent abroad to ship him certain goods, which the latter procures upon his own credit, without naming the trader in London, and ships to him at the original price, charging only his commission. Held—That the correspondent abroad is so far a *vendor*, as between him and the trader, that on the bankruptcy of the latter he may stop the goods *in transitu* by procuring the bill of lading from the bankrupt's brother; and thus, though the trader had before his bankruptcy accepted bills drawn on him by his correspondent for the amount of the goods, such acceptances, provable under his commission, amounted at most to part payment for the goods, which does not take away the vendor's right to stop *in transitu.*—*Tried in Court of King's Bench, November* 17, 1802.—*From East's Reports, vol.* 3, *page* 93.

GENERAL.

	Case No.		Case No.
Laclouch v. *Towle* (1800)	236	*The "Tigress"* (1863)	107
Sweet v. *Pym* (1800)	104	*Pontifex* v. *Midland* (1866) ...	108
Scott v. *M. G. W.* (1852)	105	*Story on Bailments* (*sec.* 581).	
M. G. W. v. *Benson* (1857) ...	106	5 & 6 *Vic., cap.* 39.	

DIGEST.

In *Laclouch* v. *Towle* (1800) a person (A.) claimed certain goods that had been delivered to a carrier by a third person (B.). The carrier, on receiving an indemnity from A., withheld delivery of the goods to B., from whom he received the goods. Justice Gould would not allow the carrier to set up any question of property out of the Plaintiff B., and held that he (carrier), having received the goods from B., was pre-

cluded from questioning his title or showing a property in any other person.

In *Sweet* v. *Pym* (1800) a "fuller" (Pym) in Exeter had received cloth from Gard, London, to be "fulled." Pym shipped the cloth back to London, and, hearing Gard had become a bankrupt, Pym overtook the ship at Deal, and got the captain to sign a bill of lading, consigning the cloth to him (Pym) in London. Pym thus obtained possession of the cloth, and sold it for a general balance due him by Gard. Sweet, the assignee of Gard, now sued for the value of the cloth. Lord Chief Justice Kenyon held that Sweet could recover the value of the cloth. Judgment accordingly.

In *Scott* v. *Midland Great Western* (1852) the assignee of the bankrupt got possession of some goods, and the bankrupt's brothers claimed the goods. The Company detained the goods until either the one party or the other proved their right to legal possession, and the Court held the Company were justified in doing this.

In *Midland Great Western* v. *Benson* (1857) the sender (Benson) stopped 13 firkins butter, although the consignee had paid him for the butter; but there was an old dispute between the two. The Company gave the butter up to sender, and then afterwards had to pay consignee the value, £40. It was held the Company could recover the £40 from sender, he having unlawfully stopped the butter, which legally belonged to the consignee.

In *The "Tigress"* (1863) the consignee, although insolvent, claimed the cargo of corn, and consequently, although senders produced one of the bills of lading (being in triplicate) the captain refused to give them the corn. Held—Refusal by the master to deliver under a claim to stop *in transitu* is a breach of duty which gives the Court of Admiralty jurisdiction under section 6 of Merchant Shipping Act, 1854. By the right to stop *in transitu* is intended not only a right to countermand the delivery to the vendee (consignee), but also to demand a re-delivery to the vendor (sender).

In *Pontifex* v. *Midland* (1866) it was held that after notice of stoppage *in transitu* had been given to the carrier, delivery to the consignees (by carrier) was not part of the (carrier's) contract; that in such case the action against the carrier was for conversion of the goods, not breach of contract of carriage.

Storey on Bailments, sec. 581.—Where goods are shipped on a credit by seller to consignee, and the consignee or buyer becomes insolvent or has failed before their arrival, the law, in order to prevent the loss which would otherwise happen to the seller or sender, allows him in many cases to countermand the delivery, and, at or before the arrival of the goods at the place of destination, to cause them to be re-delivered to himself or some other person appointed to act for him. This is usually called a stoppage *in transitu*. In such a case the delivery to the carrier is supposed to vest the title to the property in the buyer, subject only to his right of devestment or stoppage *in transitu*. The right, however (as will be at once perceived), is not an unlimited right. It exists only in cases where all the following circumstances concur:—Where the goods are sold on credit, where the consignee is insolvent, where the goods are still in transit and have not been delivered to the consignee, and where the buyer has not yet parted with his ownership to any *bonâ fide* purchaser without notice under him. Each of these requisites is important enough to deserve a separate discussion in its proper place, and especially the question under what circumstances the transit is or is not at an end, which is full of nice distinctions and curious learning.

Stoppage in transitu.—The Act of 5 & 6 Vic., cap. 39, of June 30, 1842, bears upon the true ownership of goods, and is entitled "An Act to amend the Law relating to Advances *bonâ fide* made to Agents entrusted with Goods."

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104. *Sweet* v. *Pym.*—Action in respect to stoppage *in transitu*. A person named Gard, of London, sent cloth to Exeter to be "fulled" by Pym, the Defendant. Gard owed Pym a general balance more than the value of the cloth. Gard became a bankrupt, at which time the cloth had been shipped at Exeter to him, and was in transit to London, but no bill of lading had been signed. Pym overtook the vessel at Deal, and got the captain to sign a bill of lading consigning the goods to him, Pym; and on the arrival of the ship in London, Pym obtained possession of the cloth. Gard's assignee now sued for the value of the cloth.

Lord Chief Justice Kenyon said—"The right of lien has never been carried further than while the goods continue in the possession of the party claiming it. Here the goods were shipped by the order and on account of the bankrupt, and he

was to pay the expense of the carriage of them to London. The custody, therefore, was changed by the delivery to the captain. In the case of *Kinlock* v. *Craig* (3 Term Reports, 119), where I had the misfortune to differ with my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession, but the contrary was ruled by this Court, and afterwards in the House of Lords, though there the factor had accepted bills on the faith of the consignments, and had paid part of the freight after the goods arrived."—*Tried in Court of King's Bench, Nov.* 10, 1800.—*From East's Term Reports, vol.* 1, *page* 4.

105. *Scott* v. *Midland Great Western Railway.*—Action for the possession of goods, where two persons claimed to be the owners of certain goods in the Company's possession as carriers. Plaintiff, Scott, the assignee of a bankrupt at Galway, went to Galway and took possession of eighteen packages of goods which were taken to the Galway Station on Sunday, 3rd August, 1851, consigned to Dublin. The bankrupt, Mortimer Kealy, traded in the name of Mortimer Kealy & Company, Kealy Brothers & Company, and Kealy Brothers. Before the goods left Galway, Thomas and Michael Kealy, brothers of Mortimer, claimed the goods from the station-master. The station-master then required Scott to give him a guarantee if he forwarded the goods to Dublin, agreeing that the goods should be detained in Dublin until Scott could prove that he was entitled to them as assignee of the bankrupt. It was held, in an action of trover by Scott against the Company to recover the goods, that the second agreement was binding on the Plaintiff, it being open for the parties before the breach of the first, without any new consideration, to have substituted another, and that the Plaintiff was, therefore, bound to prove that he had, before bringing the action, satisfied the Company as to his title to the goods. It would seem that Scott claimed the goods on the ground that he delivered them to the Company, and that by that delivery made a contract with the Company, and that the guarantee afterwards given did not constitute a new contract by which the goods might be withheld from him. The Judge, however,

ruled that the guarantee constituted a new contract, and the Company were right in detaining the goods until the true ownership of same should have been proved. Judgment for Company.—*Tried in the Court of Common Pleas, April* 15 *and* 20, 1852.—*From Irish Common Law Reports, vol.* 3, *page* 59.

106. *Midland Great Western Railway Company* v. *Benson.*—Action in respect to stoppage *in transitu.* The Defendant (Benson) forwarded 13 firkins of butter from Carrickmahon by the Company's canal to Dublin, consigned to C. Kelly, of Liverpool. He obtained the Company's receipt, which he forwarded to Kelly, and obtained from Kelly, upon the faith of the receipt, a sum of £40. It appeared Benson had previously sent Kelly butter to sell for him in Liverpool, but he was dissatisfied with the price the previous lot of butter realised, and he therefore desired to appropriate the £40 in satisfaction thereof. He accordingly came to Dublin and overtook the butter, and by representing to the Company's servants that the butter was his absolute property, obtained possession of it. Kelly, not receiving the butter, threatened the Company with legal proceedings, and the Company therefore paid him £40 for the butter, and now, by an action against Benson, sought to recover from him the sum of £40 in question.

Chief Justice Monahan said—"We are all satisfied that the case of *Brown* v. *Hodson* was well decided, and that the present case cannot be distinguished in principle from that. With respect to the alleged neglect on the part of the Company, if the Defendant had not transmitted the receipt to Kelly and got £40, he would have been clearly entitled to get back the goods. Now, it appears that when he came for the goods to Dublin he represented to the Company that they were his under circumstances which, if true, would have entitled him to get them back; consequently there was no neglect on the part of the Company in thus parting with the possession of the goods.

"Therefore the law will imply that the Defendant promised to repay the Company the money which they were bound to pay to Kelly, who was in a position to maintain against them an action for the £40; and so, upon the authority of *Brown* v.

Hodson, we are of opinion that this verdict must stand. Judgment for Company.—*Tried in the Court of Common Pleas (Ireland), June* 3, 1857.—*From Irish Common Law Reports, vol.* 7, *page* 52.

107. *The "Tigress."*—Action in respect to stoppage *in transitu*. A cargo of corn was sent from New York for one Bushe, of Bristol, at the request of Lucy & Co., Liverpool. Before delivery Bushe became insolvent, and Lucy & Co. presented one of the bills of lading and demanded the corn, which the captain of the ship "Tigress" refused to give up, even on an indemnity, because Bushe claimed it upon the one bill of lading he held.

Held—Refusal by the master of a ship to deliver goods under a claim to stop *in transitu* is a breach of duty which gives the Court of Admiralty jurisdiction under section 6 of the Merchant Shipping Act, 1854.

By the right to stop *in transitu* is intended not only a right to countermand the delivery to the vendee, but also to demand a re-delivery to the vendor.

Though the indorsement of a bill of lading passes the property in the goods, yet the indorsement to the consignee of one bill of a triplicate set is not such a negotiation as to prevent the right of stoppage.

If bills of lading are presented to the master by two different holders, and he delivers to one, no right of action against him accrues thereby to the disappointed holder, as it is not for the master to inquire who has the best right. (This may be important where the sender of goods hands a carrier's receipt to a person and raises money upon it, and then sells the goods to a second person, giving a written order for delivery.) —*Tried in Court of Admiralty, January* 27, *February* 27, 1863.—*From Law Journal Reports, vol.* 32, *page* 97.

108. *Pontifex* v. *Midland Railway.*—Action in respect to stoppage *in transitu*. An action against a carrier for neglect of duty in delivering goods to the consignee after notice of stoppage *in transitu* is founded on *tort*.

Justice Lopes regarded the action as one of contract. Chief Baron Kelly said—"The case seems to me to be without

difficulty. A contract was made between the Plaintiff and the Defendants that the latter should carry goods to Birmingham, and deliver them there. After the contract was made, and before delivery of the goods to the consignees, notice of stoppage *in transitu* was given to the carriers, by which they were required not to deliver the goods to the consignees, but to hold them for the benefit of the sender. So soon as this notice reached the Company the contract came to an end. Delivery to the consignees afterwards was not part of the contract. The Plaintiff had a right to re-demand his goods from the Company before delivery; and, under the old procedure, if the Company had neglected to re-deliver them, the Plaintiff's remedy would have been in *trover*, *i.e.*, in *tort*. The words of the Act of Parliament referred to (the County Court Act, 1867, sec. 5) cannot alter the nature of the remedy. Under these circumstances, Justice Lopes' order will be rescinded."—*Tried in the Court of Exchequer, December* 20, 1866.—*From Weekly Reporter, vol.* 25, *page* 215.

CIRCUMSTANCES UNDER WHICH THE TRANSITUS IS STILL IN COURSE.

	Case No.		Case No.
Northey v. *Field* (1796)	109	*Bolton* v. *L. & Y.* (1866)	116
Richardson v. *Goss* (1802)... ...	110	*Berndtson* v. *Strong* (1868) ...	117
Patten v. *Thompson* (1816) ...	111	*Coventry* v. *Gladstone* (1868) ...	118
Tucker v. *Humphrey* (1828) ...	112	*Ex parte Barrow, re Worsdell* (1877)	119
Edwards v. *Brewer* (1837)... ...	113	*Re M'Laren, ex parte Cooper* (1879)	120
James v. *Griffin* (1837)	114	*Ex parte Rosevear C. Co., re Cock* (1879)	121
Whitehead v. *Anderson* (1842)...	115		

DIGEST.

In *Northey* v. *Field* (1796) wine arrived by ship for Leyland & Cragg, who becoming bankrupt, the wine was removed to the King's warehouse for the excise duty. The day before the expiration of the three months' grace to pay the duty senders (Field) claimed the wine. The bankrupt's assignee (Northey) sued for the value. Lord Kenyon held that senders' notice to the Excise was sufficient to establish a stoppage *in transitu*.

In *Richardson* v. *Goss* (1802) three hogsheads of hams came from Newcastle to London, and were lodged in Defendant's warehouse, being consigned to Wilson. Wilson became bankrupt, and wrote sender (Richardson) he would not take the hams, and thus rescinded the purchase. Goss had no advice of this, and, having an old balance due from Wilson, detained the hams. The Court held the contract of purchase had been rescinded, and Goss could not hold the hams from Richardson (sender), although he might have done so against Wilson by the custom of a warehouseman's lien for an old balance.

In *Patten* v. *Thompson* (1816) a cargo of wheat was sent from Westport to Liverpool, consigned to the factor (agent) of a Dublin firm. The factor became bankrupt, and his assignee claimed the cargo. Lord Ellenborough held that the unpaid sender may stop *in transitu* before the goods came to the hands of the consignee's factor, although the factor has the bill of lading, indorsed "to order," in his hands, and is under acceptance to the consignee on a general account.

In *Tucker* v. *Humphrey* (1828) twenty-five sacks flour were brought by ship, Stockton to London. The ship came alongside the wharf on 12th April, and was unloaded between 22nd and 26th April; on 10th April consignee became a bankrupt; on April 17 sender gave notice of stoppage *in transitu;* on April 19 the messenger in bankruptcy claimed the flour. With former consignments consignee sometimes took delivery from the ship, and sometimes from the wharfinger's (Humphrey's) warehouse. The Court held that, no act of ownership having been exercised over the flour by consignee, the *transitus* was not at an end when sender gave notice on April 17. Judgment for wharfinger.

In *Edwards* v. *Brewer* (1837) thirty-seven tons of iron pipes arrived in Thames. The consignee was away, and his clerk wrote—"You had better land the goods at Griffin's Wharf on my master's account." The

pipes were landed, not in consignee's name, but in blank. Baron Parke, in respect to the clerk's letter, said—"It is the same as if the clerk had not acted at all." Sender's right of stoppage thus held good.

In *James* v. *Griffin* (1837) sheet lead arrived in the Thames. The captain pressed consignee (Emerson) to have the lead immediately. Consignee's son had the lead landed on the wharf, but Emerson told his son not to meddle with the lead, that (being insolvent) he did not intend to take it, and that the sender ought to have it. After the lead was on the wharf sender stopped it there *in transitu*. Held—That Emerson's assignee could not recover the lead, that Emerson had not taken possession of the lead as *owner*, and therefore that the *transitus* was not determined.

In *Whitehead* v. *Anderson* (1842) a cargo of timber arrived at Fleetwood from Quebec. Consignee's assignee met the ship on arrival, and told the captain he had come to take possession of the cargo. He went into the cabin, into which the ends of the timber projected, and saw and touched the timber. The captain made no reply, but subsequently, at the same interview, told him he would deliver him the cargo when he was satisfied about the freight. Subsequently the sender's agent served a notice of stoppage *in transitu* upon the mate, and afterwards received the cargo. Held by the Court—That there was no *actual* possession taken of the timber by the assignee, and that, as there was no contract by the captain to hold the goods as their agent, the circumstances did not amount to a *constructive* possession.

In *Bolton* v. *Lancashire and Yorkshire* (1866) sender sold consignee eleven skips of twist, to be delivered at different dates. Consignee received the first three skips and paid for them, but, the quality being bad, refused the other eight. Consignee's carter took four of these skips from the station in mistake, but at once returned them. Consignee then re-consigned the eight skips back from Brierfield to Salford. Sender

refused them, and sent them back again to Brierfield. Consignee then became a bankrupt, and sender then gave Company notice of stoppage *in transitu*, and the Company gave the skips up to sender. The consignee's assignee then sued the Company for value of the skips. Chief Justice Erle held that it was clear consignee did not intend to take the goods, and that the goods had never ceased to be *in transitu*. Judgment for Company.

In *Coventry* v. *Gladstone* (1868) linseed, shipped Smyrna to London, was mortgaged before arrival. Before the ship arrived consignee became bankrupt, and the mortgagees, on the arrival of the ship, obtained a delivery order for the linseed, and handed it to an officer on board the ship, who promised to deliver to them the linseed when he got it clear. The Court held that this did not amount to a constructive delivery, and sender's right of stoppage *in transitu* remained.

In *Berndtson* v. *Strong* (1868) a quantity of timber was shipped in Sweden for London, and the consignee chartered the ship. From bad weather the ship put into Copenhagen, where sender (Berndtson) served the captain with a notice of stoppage *in transitu*. The vessel went on to London, and consignee having gone into liquidation, his assignee (Strong) acquired the timber and sold it. The sender now sued for the value. Lord Cairns, in the Court of Chancery, held that the sender, by virtue of his right of stoppage *in transitu*, was entitled to the proceeds of the sale of the cargo of timber.

In *Ex parte Barrow, re Wordsell* (1877) leather was shipped to Falmouth, and unloaded from steamer into carrier's warehouse. Consignee was then an absconding bankrupt. The course of business was to hold consignee's goods in the warehouse subject to his order. The bankrupt's receiver did not claim the goods before sender gave notice of stoppage *in transitu*. Held—That the *transitus* was *not* at an end when the goods were

stopped, nothing having taken place to constitute the carriers at Falmouth bailees for the consignee.

In *Re M'Laren, ex parte Cooper* (1879) 114 tons of castings were sent by ship from Scotland to London, consigned to M'Laren. Thirty tons had been unloaded when M'Laren, who was in Scotland, telegraphed to stop unloading any more. M'Laren went into liquidation. In the Court of Appeal, Lord Justice Brett held—"Part delivery of a cargo, or of the bulk of the goods, is not *primâ facie* delivery of the whole," and that the *transitus* of the remainder of the castings had *not* ended; that the fact that M'Laren was a partner in the Scotch firm (sender's) made no difference.

In *Ex parte Rosevear China Clay Company, re Cock* (1879) a cargo of china clay had been shipped on board a vessel. The payment was by acceptance, and the purchaser had chartered the ship. The purchaser became insolvent. Sender gave the master notice of stoppage *in transitu*. Held—That the clay was in the possession of the master of the ship only as carrier, and not as agent of the purchaser, and that the *transitus* was therefore not at an end.

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109. *Northey* v. *Field.*—Action in respect to stoppage *in transitu*. Wines, value £109, were purchased by Leyland & Cragg from Field. The ship arrived with the wine, and the excise duty not being paid, owing to consignees becoming bankrupt, the wine was removed to the King's warehouse. The practice was to keep it in this warehouse for three months; if not redeemed and excise duty then paid, the wine was sold for the duty. In this case the wine was sold, and realised £109. The day before the three months expired the senders applied for the wine, but did not succeed in obtaining it. The assignee of Leyland & Cragg now claimed the proceeds of the sale, less duty.

Lord Kenyon said—"I am of opinion the Plaintiff is not entitled to recover. The Courts had, of late years, leaned much in favour of the power of the sender to stop his goods *in transitu;* it was a leaning to the furtherance of justice. Lord

Hardwick had been of opinion that, in order to stop goods *in transitu*, there must be an actual possession of them obtained by the sender before they come to the hands of the consignee; but that rule had since been relaxed, and it was now held that an actual possession was not necessary—that a claim was sufficient—and to that rule he subscribed. In the present case, the bankrupt had no title to the actual possession till the duties were paid; until then they were *quasi in custodia legis*. Before the sale the agent for the senders claimed and endeavoured to get possession, and that was a sufficient stopping *in transitu*, in my opinion, to secure the rights of the senders."—*Tried at Nisi Prius, December* 12, 1796.—*From Espinasse's Reports, vol.* 2, *page* 613.

110. *Richardson* v. *Goss.*—Action for detention of three hogsheads of hams and bacon by a wharfinger at London for a general balance due by consignee. The hogsheads were shipped by "Formosa" from Newcastle, consigned to Wilson. Wilson gave the captain of the ship an order to deliver to Defendant's (Goss's) wharf. Wilson, having become embarrassed in his circumstances, wrote sender to tell him so, and agreeing not to take the three hogsheads in question, but he gave the wharfinger (Goss) no notice of this. Sender (Richardson) in a few days came to London, and demanded the three hogsheads from Goss, and Goss refused to give them up, because Wilson owed him a general balance.

On the appeal case, Justice Heath said—"It was perfectly competent to the vendor and vendee to rescind the contract (of purchase), and I think that the contract was rescinded by relation on 1st June (date of Wilson's letter to sender). This case differs from a case of bankruptcy, for there, if any act of bankruptcy intervene between the offer to rescind and the assent, the assent comes too late to prevent the act of bankruptcy (*Smith* v. *Field*, 5 T. R., 402). Here, therefore, I think that the relation must take place agreeably to the reasoning made use of in *Atkin* v. *Barwick*, which, though it has been thought by Lord Mansfield, Lord Kenyon, and other Judges not to have been applicable to that case, is applicable to this. Here the wharfinger had no right to retain the goods against

Richardson, who was no creditor in respect of anything but what had been laid out upon them; though if Wilson had demanded the goods, the wharfinger would have had a right, founded upon custom, to retain for his general balance. In this case no fraud appears, nor any suspicion of fraud, but a mere negligence on the part of Wilson, who certainly ought to have given notice to the Defendant (Goss) of his having put an end to the contract. The title of Richardson was the preferable title; under these circumstances, therefore, the wharfinger has no right to set up any lien against him for the general balance due from Wilson."

Semble—That the goods were no longer *in transitu* when arrived at the wharf of Goss, where the goods of Wilson were usually landed and kept till he sent for them. Judgment against wharfinger.—*Tried at Guildhall Sittings, May* 12, 1802.—*From Bosanquet and Puller's Reports, vol.* 3, *page* 119.

111. *Patten & Co.* v. *Thompson.*—Action in respect to stoppage *in transitu.* The goods consisted of 108 tons wheat (a cargo), kiln-dried, screened, and free on board at Westport, county Mayo, at 34s. 6d. per barrel of 20 stone. The wheat was consigned to Liverpool. It was consigned there to a factor of a Dublin house; this factor became bankrupt, and his assignee claimed the cargo.

It was held by Lord Ellenborough that the unpaid sender may stop the goods *in transitu* before they came to the hands of the consignee's factor, although the factor has the bill of lading indorsed to order in his hands, and is under acceptance to the consignee on a general account. Wherefore, in such case where the consignee became bankrupt and the factor also became bankrupt, and the messenger of the latter's assignee, upon the arrival of the ship, went on board and seized the cargo, the agent or the sender having previously given notice to the captain to deliver the cargo to him, and the captain having agreed thereto: Held—That trover would lie by the sender against the assignee of the bankrupt factor.—*Tried in Court of King's Bench, Nov.* 12, 1816.—*From Maule and Selwyn's Reports, vol.* 5, *page* 350.

112. *Tucker* v. *Humphrey.*—Action in respect to stoppage *in transitu* of twenty-five sacks flour, value £52 10s., Stockton

to London, by sea. Wilkinson & Co., Stockton, purchased the flour as commission agents for Gilbert, to whom it was consigned and invoice sent, Wilkinson & Co.'s commission being 1s. per sack. The flour reached London 12th April, but remained in the ship until between 22nd and 26th April. On 10th April Gilbert became a bankrupt, and his assignees claimed the flour. On the 17th April Wilkinson, finding Gilbert had become a bankrupt, sold the flour to Cramp, who claimed it from the wharfinger, Humphrey (Defendant).

The Judge said—"This case has been correctly argued upon the ground whether the *transitus* was continuing, or whether it was at an end owing to the flour not having been unloaded from the ship and put into the warehouse." (Plaintiff had contended that the point of destination was the warehouse, but it was proved that in former consignments consignee sometimes took delivery from the ship and sometimes from the warehouse. If he had not sold the flour before it was time for the ship to make her next voyage, then the flour was unloaded into the warehouse and delivered therefrom.)

The Judge said the flour in question had arrived at the wharf on the 12th April, but was not landed until the 22nd April. No act of ownership was exercised over it by Gilbert; no invoice, no bill of lading, ever produced by him or any agent employed on his behalf, till the messenger under the Bankruptcy Commission claimed it on the 19th April, the shipper having actually stopped it two days before; so that the very first act done upon the flour after the ship's arrival at the wharf was done by the sender before the transit to the hand or possession of the consignee was complete. Judgment for wharfinger.—*Tried in Court of Common Pleas, Feb.* 12, 1828. —*From Bingham's Reports, vol.* 4, *page* 516.

113. *Edwards* v. *Brewer.*—Action in respect to stoppage *in transitu.* The goods consisted of thirty-seven tons iron pipes, carried from Newport, South Wales, to London. Consignee became a bankrupt, and his assignee claimed the goods.

Baron Parke said—"The assignees have no title to these goods until they have got into the hands or possession of the consignee. They were landed at Griffin's Wharf, on the

Thames, where he had not usually had his goods landed. Had he then taken possession of them? The consignee is away, and his clerk writes—'You had better land the goods at Griffin's Wharf on my master's account.' It is the same as if the clerk had not acted at all. Then how does the captain act? He lands them, not in the consignees name at all, but in blank, with freight and charges set against them. Then the other point as to the bill. It is settled by the case of *Feise* v. *Wray* that by an acceptance of bills the sender's right to stop *in transitu* is not taken away. The acceptance would not diminish his right to retain possession until the whole price was paid. Whether the effect of the stoppage *in transitu* be to rescind the contract or merely to re-vest a lien does not seem to be quite settled," (*Clay* v. *Harrison*, 7 T. R., 440).—*Tried in Court of Exchequer, Easter Term*, 1837.—*From Meeson and Welsby's Reports, vol. 2, page* 375.

114. *James* v. *Griffin.*—Action, stoppage *in transitu.* Sheet lead was consigned by Stagg to Emerson, deliverable in the river Thames. On the arrival of the vessel in the river, the captain pressed Emerson to take the lead immediately. Emerson, in consequence, sent his son with directions to land the lead at a wharf where he was accustomed to have goods landed for him and kept until he carted them away to his customers in his own carts. But Emerson (being then insolvent) at the same time told his son he would not meddle with the lead, that he did not intend to take it, and that the sender ought to have it. The goods were, by the son's directions, landed at the wharf, and there stopped *in transitu* by the sender. Emerson afterwards became bankrupt, and his assignees now sued the wharfinger for the value of the lead. Held—That the declarations made by Emerson and his son were admissible in evidence, although they were not communicated to the sender or to the wharfinger, and that they showed that Emerson had not taken possession of the lead *as owner*, and therefore that the *transitus* was not determined. Judgment for wharfinger.—*Tried in Court of Common Pleas, Trinity Term*, 1837.—*From Meeson and Welsby's Reports, vol. 2, page* 623.

115. *Whitehead* v. *Anderson.*—Action in respect to stoppage *in transitu*. The goods consisted of a cargo of timber, shipped from Quebec to Fleetwood. A notice of stoppage was given to the shipowner at Montrose while the timber was on the voyage, whereupon he sent a letter to await the arrival of the captain at Fleetwood, directing him to deliver the cargo to the agents of the sender. This was held not to be a sufficient notice of stoppage *in transitu*. The vessel arrived in port on the 8th August, on which day, before the captain had received his owner's letter, the agent of the assignee of the consignee (who had become bankrupt) went on board, and told the captain he had come to take possession of the cargo. He went into the cabin, into which the ends of the timber projected, and saw and touched the timber. When the agent first stated that he came to take possession the captain made no reply, but subsequently, at the same interview, told him that he would deliver him the cargo when he was satisfied about the freight. They then went on shore together. Shortly afterwards the agent of the sender came on board and served a notice of stoppage *in transitu* upon the mate, who had charge of the cargo, and, a few days afterwards, received possession of the cargo from the captain.

Held—That under these circumstances there was no *actual* possession taken of the timber by the assignees, and that, as there was no contract by the captain to hold the goods as their agent, the circumstances did not amount to a *constructive* possession of the goods by them.

A notice of stoppage *in transitu*, to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has the custody at such a time and under such circumstances as that he may, by the exercise of reasonable diligence, communicate it to his servant in time to prevent the delivery to the consignee.—*Tried in Court of Exchequer, January* 31, 1842.—*From Meeson and Welsby's Reports, vol.* 9, *page* 518.

116. *Bolton (Assignee)* v. *Lancashire and Yorkshire Railway Company.*—Action for £301 12s. 1d., value of eight skips of 32 cob twist at 2s. 9d. per lb. The claim

was made upon the Company by the assignee of the consignee, who had become a bankrupt. The sender (Wolstencroft) sold consignee eleven skips of the twist, to be delivered in several lots. Three skips were sent from Salford Station (where the eleven were lying) consigned to Parsons, Brierfield Station. Parsons accepted the three skips, and paid sender £95 for them. The three skips were sent on the 22nd July; again, on 4th August, four skips more were sent; and again, on the 1st September, the last four skips were sent. Sender on the 19th July had sent consignee an invoice for the eleven skips. After receiving the three skips Parsons found the twist so bad that he returned the invoice, and refused, by letter of August 4th, to take the remainder, eight skips. Sender insisted upon the twist being accepted, and sent a new invoice for the eight skips. On the 12th September Parsons' carter, in mistake, took four skips from the station, but his master at once returned them. On the same day Parsons consigned the eight skips to sender, and the Company carried them to Salford. Sender (Wolstencroft) refused to receive the skips, and they were sent back again to Parsons at Brierfield. Parsons still refusing the skips, the Company sent them back again to Salford on the 7th September. On the 30th September Wolstencroft served a notice under the Bankruptcy Act, requiring payment for the eight skips. On the 3rd October a trader-debtor summons was served on Parsons, who on the 12th October resisted in the Bankruptcy Court the demand; but an order was made that Parsons should enter into a bond for payment of the sums recovered and costs, though Parsons filed an affidavit that he had a good defence on the merits. On 19th October Parsons was, on his own petition, adjudicated a bankrupt. On the 4th October, the day after the trader-debtor summons was served, Wolstencroft ordered the Company to retain the skips to his order; and again, on the 19th October, the day Parsons petitioned in bankruptcy, the notice was repeated by Wolstencroft to the Company. On the 21st October the officer of the Court of Bankruptcy claimed the skips from the Company as part of the assets of Parsons. On the same day Wolstencroft demands the skips from the Company, and on the 29th October the Company deliver the skips to

Wolstencroft. The case was first tried at the Liverpool Spring Assizes, before Justice Shee, when a verdict was found against the Company, subject to appeal. The case submitted for the opinion of the Court of Common Pleas was whether the Plaintiff was entitled to recover, and then the verdict was to stand; if not, then the verdict to be entered for the Company.

Chief Justice Erle, on the appeal, said—"I am of opinion our Judgment should be for the Company. The point to be decided is, if the vendor (sender) had a right to stop the goods *in transitu*. The eight skips had arrived at the Brierfield Station, and I think they had not ceased to be *in transitu* by being at the station. Being refused by Parsons and by Wolstencroft, I think they never ceased to be *in transitu*. It appears, from the case of *James* v. *Griffin* (2 M. & W., 623), that the intention of parties is material; and so, in *Whitehead* v. *Anderson* (9 M. & W., 529), Baron Parke says—'The question is *quo animo* the act is done. My notion has always been that the question is whether the consignee has *taken* possession, not whether the captain has intended to deliver it.' Parsons refused to take the goods, and the goods delivered from Brierfield Station to his mill were delivered contrary to his instructions by his carter, and it was the same as if a wrongdoer had taken them, and then they had been brought back. It is clear Parsons did not intend to take them, and if they were warehoused, I think they were warehoused for the real owner. A carrier may be a warehouseman of goods arrived at their destination, but to constitute him such there must be a change from the capacity of carrier to that of warehouseman, and that cannot take place unless the parties intend it. It is clear that Parsons did not constitute the Company warehousemen, and then the vendor (sender) lays his hands on them, and that is a sufficient defence to this action."

Justice Willes said—"The person who received the goods from the seller (sender) was the person who was to deliver them to the buyer (consignee), and the question is if the agency for the seller (sender) had ever ceased. I think sender's action must be considered to mean, 'I insist on the buyer taking them, and if he will not you must hold them for me.' Passing to the question of stoppage *in transitu*, there is

no doubt that the property passed, but there never would be any need for stoppage *in transitu* if it did not. The reason is that the risk is on the buyer (consignee), and if the goods are destroyed they are at the buyer's risk; but it does not follow from that, that a bankrupt is to have them delivered to him unless he is ready to pay the price, and that is the reason for the vendor's (sender's) lien. The seller (sender) parts with his lien by giving up the goods to the buyer (consignee) or his agent, or to a *carrier designated by him*, and the right of stoppage *in transitu* continues until the goods are in the hands of the buyer (consignee) or his agent, or till they are on a fresh transit. The arrival of the goods, to do away with the right to stop *in transitu*, must be an arrival on which the buyer has taken real or *constructive* possession of the goods, and that is not so long as he refuses to accept. Therefore, in this case, the *transitus* had not come to an end. There is a bye point, viz., the alleged delivery and the effect of that on the right to stop *in transitu*, and there have been questions if a delivery of a part of the goods under a contract puts an end to that right. It has been said that a delivery of a part is a delivery of the whole but that decision has been dissented from, and it has been said that it is only so when the delivery of the part is in course of delivery of the whole, and the taking possession of that part is then an acceptance of *constructive* possession of the whole. It would seem, therefore, that the law on that point, as on the question of stoppage *in transitu*, depends on the buyer (consignee) having taken possession of the goods. Therefore, the mistake of the carter had no effect on the rights of the parties, as it was not a taking possession by the buyer of a part of the goods. I think this is a very plain case of stoppage *in transitu*, and that our Judgment should be for the Company."

Justice M. Smith said—"The strength of Plaintiff's case was that the goods had been in the hands of the Company as warehousemen for Parsons; but they could not be so without his consent, and it is clear that he never meant to take them, and if he had not become a bankrupt he would have resisted taking possession." Judgment for Company.—*Tried in Court*

of Common Pleas, January 17, 1866.—*From Law Times Reports, vol.* 13, *page* 764.

117. *Berndtson* v. *Strong.*—Action in respect to stoppage *in transitu.* A quantity of timber was to be sent from Sweden to London. The contract was that it was to be delivered free on board. The seller was to provide ships at rates not exceeding a certain limit. It was subsequently agreed that the buyers should themselves charter a ship to convey a cargo to London. This was done, but before the timber arrived in London the buyers had gone into liquidation, and their assignee had acquired the timber and sold it for the benefit of the estate. The sender in Sweden now sued the assignee for the value of the timber, upon the plea of stoppage *in transitu.* The ship was, from bad weather, several months on the voyage, and on March 24 had to put into Copenhagen, where sender served notice of a stoppage *in transitu* on the captain before the ship went on to London.

It was held by Lord Chancellor Cairns that the seller was entitled, by virtue of his right of stoppage *in transitu*, to the proceeds of the cargo paid into Court.

Held also, varying the decree, that he was not entitled to the money paid upon the policy of insurance; and, thirdly, that he was entitled to retain so much of the dividend (5s. in the £) received from the trustees as would be equal to a dividend on the unpaid balance of his debt, the residue being set off against an equal amount of the fund in Court.—*Tried in Court of Chancery, April* 21, 1868.—*From Law Journal Reports (Chancery), vol.* 37, *page* 665.

118. *Coventry* v. *Gladstone.*—Action, stoppage *in transitu.* Gillanders, A., & Co. shipped linseed from Smyrna to Wilson & Co., London, by a general ship. Wilson & Co., having obtained the bill of lading, mortgaged the cargo, and subsequently, before the ship's arrival, became bankrupt. Wilson & Co.'s mortgagees, after the ship had arrived, obtained a delivery order for the linseed and handed it to an officer on board the ship, who promised to deliver the linseed to them when he got it clear. Held—That this did not amount to a constructive delivery of the goods, and that the sender's right of stoppage

in transitu remained. The test of the sender's right of stoppage is not whether the voyage is at an end, but whether there has been a delivery of the goods to the consignee. In order to create a constructive delivery, there must be a fresh agreement between the parties as to holding or delivery of the goods.—*Tried in Court of Chancery, March* 2, 4, 1868.—*From Law Journal Reports (Chancery), vol.* 37, *page* 492.

119. *Ex parte Barrow, re Worsdell.*—Action in respect to stoppage *in transitu.* A quantity of leather was shipped by steamer to Falmouth, and was unloaded into the carriers' warehouse. The consignee (Worsdell) could not be advised of the arrival of the goods because, before the goods were landed, he had become an absconding bankrupt. The course of business of the Falmouth carriers' agents was to hold the goods subject to the order of the consignee on his paying warehouse rent and freight. On 4th November Worsdell was adjudicated a bankrupt, and a receiver appointed, and on the same day, the goods not having been paid for, and not having been claimed on behalf of the consignee, the senders telegraphed to the carriers' agents at Falmouth to stop delivery.

Held—That the transit was *not* at an end when the goods were stopped, and nothing having taken place to constitute the carriers at Falmouth bailees for the consignee.

Semble—That a wharfinger holding goods *in transitu* cannot turn himself into an agent for the consignee, so as to put an end to the *transitus*, without the express authority of the consignee.—*Tried in Court of Bankruptcy, March* 12, 1877.—*From Law Journal Reports, vol.* 46, *page* 71.

120. *In re M'Laren, ex parte Cooper.*—Action in respect to stoppage *in transitu.* On 30th July 114 tons castings were sent in a ship from Scotland to London, consigned to M'Laren, who traded in London on his own account. He, however, was likewise a partner in the firm sending the castings (Albion Iron Company, Alloa). On the 7th August M'Laren's manager in London commenced to unload the ship, and had actually unloaded thirty tons, and paid freight on that quantity, when M'Laren, who was in Scotland, telegraphed to stop unloading any more castings until he reached London. M'Laren filed a

petition of liquidation, and then his assignee claimed the remainder of the castings, and so likewise did the senders in Alloa.

In the Court of Appeal it was held that at the time when M'Laren directed the delivery to be stopped the goods were in the hands of the shipowner as carrier, and that the *transitus* was not at an end; that accordingly the senders (vendors) could exercise their right of stoppage *in transitu*; and that the delivery of the thirty tons was not such a constructive delivery of the whole cargo as to prevent the exercise of that right or to make the act of M'Laren in refusing to accept delivery a fraudulent preference of the Scotch firm; that the fact that M'Laren was also a partner in the Scotch firm made no difference. *Per* Lord Justice Brett—"Part delivery of a cargo, or of the bulk of the goods, is not *primâ facie* delivery of the whole." *Per Curiam*—"When goods are placed in the possession of a carrier to be carried and delivered, the *transitus* is not at an end so long as the carrier continues to hold the goods as carrier, and is not at an end until the carrier, by agreement between himself and the consignee, agrees to hold the goods for the consignee, not as a carrier, but as his agent; and the same principle will apply to a warehouseman and wharfinger. Judgment for senders.—*Tried in the Court of Appeal, February* 20, 1879.—*From Law Journal Reports* (*Bankruptcy*), *vol.* 48, *page* 49.

121. *Ex parte Rosevear China Clay Company, re Cock.*—Action in respect to stoppage *in transitu*. A contract was made for the sale of a quantity of china clay, to be delivered free on board at a specified port (Fowey), payment to be by the purchaser's acceptance. The purchaser chartered a ship, and gave notice to the sender (vendor), who then delivered the clay on board the ship at the specified port. Before the ship left Fowey the sender, hearing that the purchaser was insolvent, gave notice to the master of the ship to stop the clay *in transitu*. No bill of lading had been signed, nor had the purchaser given any acceptance in payment of the contract price.

Delivery of goods by a vendor (sender) on board a ship chartered by the purchaser is only constructive and not actual delivery to the purchaser, inasmuch as the contract with the

master of the ship to carry the goods does not make him the agent of the purchaser; and so long as the goods remain in the hands of the master of the ship as carrier the vendor's (sender's) right of stoppage *in transitu* continues.

Till the goods are actually delivered to the purchaser or his agent the *transitus* is not at an end, and it makes no difference that the ultimate destination of the goods has not been communicated by the purchaser to the vendor (sender).

Held—That the clay was in the possession of the master of the ship only as carrier, and not as agent of the purchaser; that the *transitus* was therefore not at an end; and that the vendor (sender) had duly exercised his right of stoppage *in transitu*. —*Tried in Court of Appeal, April* 24, 1879.—*From Law Times Reports, vol.* 40, *page* 730.

CIRCUMSTANCES UNDER WHICH THE TRANSITUS IS AT AN END.

	Case No.		Case No.
Scott v. *Pettit* (1803)	122	*Allan* v. *Gripper* (1832)	126
Hurry v. *Mangles* (1808)	123	*Schotsman* v. *L. & Y.* (1867) ...	127
Rowe v. *Pickford* (1817)	124	*Ex parte Gibbes, re Whitworth* (1875)	128
Foster v. *Frampton* (1826) ...	125		

DIGEST.

In *Scott* v. *Pettit* (1803) Defendant was a "packer" in London, and goods sent to consignee were addressed to the "Bull and Mouth" Inn. There was a standing order for such goods to be thence delivered to Pettit's house. Consignee became an absconding bankrupt, and his assignee (Scott) claimed the value of the goods which Pettit had delivered to sender. Lord Alvanley held the *transitus* had ended at Pettit's house, and the assignee could recover.

In *Hurry* v. *Mangles* (1808) Defendant, a warehouseman, sold oil lying in his warehouse to J. S. on a bill for six months. J. S. sold the oil *bonâ fide* to Hurry (Plaintiff), and Hurry paid warehouse rent, but did not remove the oil. J. S. became bankrupt, and hence his bill was of no value, and Defendant refused to

give up the oil to Hurry. Lord Ellenborough held the acceptance of the warehouse rent by Defendant was a complete transfer of the goods to the purchaser. This was an executed delivery from the seller to the buyer.

In *Rowe* v. *Pickford* (1817) goods arrived in London from Manchester, and consignee was advised. He became a bankrupt, and did not remove the goods. It was consignee's practice to allow the goods to remain in the carrier's warehouse until he shipped them to the Continent. Sender gave notice to carrier of stoppage *in transitu*. Held by Justice Chambre—That the *transitus* had ended, and the bankrupt's assignee could recover the value of the goods.

In *Foster* v. *Frampton* (1826) consignee sampled three hhds. sugar, and told the carrier to keep the casks in his warehouse for him. Justice Bayley held that from that time the carrier became the warehouseman of the bankrupt (consignee), and the goods were as much in the possession of the latter as if he had taken them into his own warehouse.

In *Allan* v. *Gripper* (1832) oil cake was carried by canal, Twickenham to Hertford, and before Allan (sender) gave notice of stoppage *in transitu* the cake had been unloaded into the carrier's (Gripper's) warehouse at Hertford on account of Pestall, the consignee. Pestall used the carrier's warehouse as a store for his cake, sometimes for months at a time, and sold the cake from the warehouse. Lord Lyndhurst held that the *transitus* of the cake was at an end when in the warehouse.

In *Schotsman* v. *Lancashire and Yorkshire* (1867) a cargo of flour was sold at Rouen to Fort & Co. (Cunliffe). Now Cunliffe was not only Fort & Co., but also a registered owner of the "Londos" vessel that carried the flour from Rouen to Goole; hence the captain was his agent. Cunliffe became bankrupt. The flour was unloaded into the Company's warehouse at Goole. The Lord Chancellor held that, as the flour

had been delivered at Rouen to an agent of Cunliffe, the seller's right of stoppage *in transitu* was gone.

In *Ex parte Gibbes, re Whitworth* (1875) Whitworth & Co. accepted a bill of exchange for value of 144 bales cotton, upon which they received the bill of lading. The Lancashire and Yorkshire Company got the cotton in Liverpool on the bill of lading, and sent the cotton on to Whitworth & Co., Luddenden Foot Station, where Whitworth & Co. had a siding into their cotton mill. Part of the cotton passed into the mill, and some portion lay in railway waggons in the Company's station. Gibbes (the seller) desired to stop this portion *in transitu.* Chief Justice Bacon held that when the Railway Company paid the sea charges, and got the cotton in Liverpool, there was an end to the *transitus* as far as Gibbes was concerned.

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122. *Scott* v. *Pettit.*—Action in respect to stoppage *in transitu.* Goods were forwarded from Manchester by carrier to the consignee at the "Bull and Mouth" Inn. There was a general order and practice for consignee's goods to be thence sent on to the house of Pettit (Defendant), who was a packer. Consignee became an absconding bankrupt, and his assignee claimed the goods from Pettit, and the day after sender likewise claimed the goods from Pettit. Pettit, on an indemnity, delivered the goods to sender, and the assignee then commenced this action against Pettit.

Lord Chief Justice Alvanley said—"The question is whether, under the circumstances of this case, the delivery of the goods to the packer is to be considered as a delivery to the bankrupt (consignee). It seems to me impossible to raise a doubt whether the *transitus* was at an end or not, for if the bankrupt had no warehouse (which was proved) to receive the goods but that of the packer, the *transitus* never could be at an end if it did not end there. Under all the circumstances of the case, I am clearly of opinion that the consignees were not entitled to consider the Defendant in the light of a mere packer, to stop the goods in his custody." Held—That the *transitus* of the

goods was at an end when they arrived at the packer's house, and consequently the assignees of consignee were entitled to recover them.—*Tried in Court of Common Pleas, June* 28, 1803.—*From Bosanquet and Puller's Reports, vol.* 3, *page* 468.

123. *Hurry* v. *Mangles.*—Action for a quantity of oil detained by warehouseman. The defendant (Mangles) is a warehouseman, and on the 19th April, 1806, sold the oil to J. S., to be paid for by his acceptance at six months. J. S., after giving his acceptance, on the next August sold the oil to Plaintiff (Hurry), who purchased it *bonâ fide*, and paid for it at the rate agreed. The oil still remained in the warehouse, and Hurry paid warehouse rent. J. S. became insolvent before his acceptance was due, and Mangles refused to deliver up the oil to Hurry; hence this action. It was contended that in Mangles' books the oil had never been transferred from J. S.'s name.

Lord Ellenborough said—"The acceptance of warehouse rent was a complete transfer of the goods to the purchaser. If I pay for a part of a warehouse so much of it is mine. This is an executed delivery from the seller to the buyer. If there was any conspiracy or contrivance on the part of the Plaintiff to cheat the Defendants out of the price of the goods, proof of that will be an answer to this action; but it would be overturning all principles to allow a man to say, after accepting warehouse rent, 'The goods are still in my possession, and I will detain them till I am paid.' The *transitus* was at an end. The goods were transferred to the person who paid the rent as much as if they had been removed to his own warehouse, and there deposited under lock and key." Judgment against warehouseman.—*Tried at Nisi Prius, November* 4, 1808.—*From Campbell's Reports, vol.* 1, *page* 452.

124. *Rowe* v. *Pickford.*—Action in respect to stoppage *in transitu.* Goods were sent from Manchester addressed to consignee in London. Consignee's practice was to allow his goods to remain in the carrier's warehouse until he could ship them to the Continent. In the present case, a few days after the goods arrived and consignee had been advised of their arrival, he became a bankrupt. The sender gave the carrier

notice of stoppage *in transitu*, which the carrier acted upon, and subsequently the goods were delivered to a second consignee by sender's orders. The assignee of the bankrupt then commenced this action against the carrier.

Judge Chambre said that he was strongly inclined to think that, if a man be in the habit of using the warehouse of a wharfinger as his own and make it the repository of his goods, and disposes of them there, the journey would be at an end when the goods arrived at such warehouse; and in *Scott* v. *Pettit* Lord Alvanley said he perfectly coincided with Mr. Justice Chambre in that which he had intimated in the former case. Both these cases were recognised in *Dixon* v. *Baldwin*, and were confirmed by Lord Ellenborough. Held—That the assignees of the bankrupt were entitled to recover the goods deposited with the carrier, and that the right of the consignee to stoppage *in transitu* ceased on the arrival of the goods at the waggon office of the carriers in London.—*Tried in Court of Common Pleas, November* 25, 1817.—*From Taunton's Reports, vol.* 8, *page* 83.

125. *Foster* v. *Frampton*.—Action for three hhds. sugar where delivery was stopped by sender, London to Birmingham. After the arrival of the sugar, consignee sampled the same, and told the carrier to keep the casks in his warehouse for him. Subsequently consignee (Fowler) became an absconding bankrupt, and his assignee (Foster) sued sender (Frampton) for the value of the three hogsheads, sender, on a bond of indemnity, having obtained the sugar from the carrier (Corbett).

Justice Bayley said—"It seems to me that in this case the *transitus* was at an end. Where a man orders goods to be delivered at a particular place, the *transitus* continues until they are delivered to the consignee at that place; but that must be understood of a delivery in the ordinary course of business, for if the consignee, before the goods reach their ultimate destination, postpones the delivery or does any act which is equivalent to taking actual possession of them, the *transitus* is at an end. Now here the bankrupt has done such an act, for he not only postponed the delivery which would have taken place in the ordinary course of business, but he took samples,

and directed the carrier to keep the goods in his warehouse until he received further directions. From that time the carrier became the warehouseman of the bankrupt, and the goods were as much in the possession of the latter as if he had taken them into his own warehouse." Judgment against the sender for the value of his own goods which he had recovered from the carrier. —*Tried in Court of King's Bench, November*, 1826.—*From Barnewall and Cresswell's Reports, vol.* 6, *page* 107.

126. *Allan* v. *Gripper.*—Action in respect to stoppage *in transitu.* The goods consisted of 2,000 oil cakes carried, Twickenham to Hertford, by canal, consigned to Pestall. On senders (Plaintiffs) hearing that consignee was a notorious insolvent, they sent notice to Gripper, the carrier (Defendant), not to deliver the cakes, but before this notice was received the cakes had been unloaded into the carrier's warehouse. The carrier also said he would deliver the goods to no one, as Pestall was in his debt, and he wished the goods were double the quantity.

Lord Chief Baron Lyndhurst, on appeal, said—"The facts of the case are shortly these: Pestall had been in the habit of employing these defendants for several years, and the course of dealing appeared to be that the oil cakes were carried to Hertford in the carrier's barges, and deposited in the carrier's warehouse, generally for many months; and evidence was given in the cause that if Pestall had sent his carts for oil cakes to the warehouse at the time in question, these oil cakes would not have been sent, but those which had been a longer period in the warehouse. There was also evidence to show that they were so deposited for the convenience of *Pestall*, that they might be distributed to his customers, many of whom resided in the neighbourhood. I left it to the Jury to say whether this was the place of final destination. They said that they thought these oil cakes were to be deposited like the rest, and that the warehouse was the place of final destination and deposit. On this state of facts it appears to me that the *transitus* was at an end, and that the Plaintiffs' (senders') right of stoppage *in transitu* was gone." Judgment for carrier.—*Tried in Court of Exchequer, Hilary Term*, 1832.—*From Crompton and Jervis's Reports, vol.* 2, *page* 218.

127. *Schotsman* v. *Lancashire and Yorkshire Railway Company.*—Action in respect to stoppage *in transitu*. The Plaintiff, Schotsman, contracted to sell to James Fort & Co. (Cunliffe) 1,870 sacks of flour. The flour was shipped in the "Londos" at Rouen, consigned on bill of lading to "Fort & Co., or assigns, he or they paying freight for the same at and after the rate as per agreement." Now Cunliffe was not only Fort & Co., but also a registered owner of the "Londos," and consequently the captain was his agent. Schotsman, finding that Fort & Co. (Cunliffe) had become bankrupt, demanded the flour from the captain on arrival of the "Londos" at Goole. The delivery was refused, and the flour was deposited in the warehouses of the Lancashire and Yorkshire Railway Company.

The Lord Chancellor said—"It is of the essence of the doctrine of stoppage *in transitu*, as was most correctly and clearly stated by Lord Cranworth (when Baron Rolfe) in the case of *Gibson* v. *Carruthers* (8 Mee. & W., 321), 'that during *transitus* the goods should be in the custody of some third person intermediate between the seller, who has parted with, and the buyer, who has not yet acquired, actual possession.' If the goods are actually delivered to an agent of the consignee, employed by him to receive delivery, the sender (vendor) is divested of his right of stoppage *in transitu*. On the other hand, although there is an actual delivery to the consignee's (vendee's) agent, the sender (vendor) may annex terms to such delivery, and so prevent it from being absolute and irrevocable. In this case the goods were shipped on board the consignee's own ship and delivered into the possession of his own servant, the master, who signed bills of lading making the flour deliverable to the consignee or assigns. There was, therefore, a delivery to the agent for his principal, and no control over the delivery was in terms reserved to the sender (vendor)." Judgment accordingly, sender being unable to stop the goods, which became claimable by Cunliffe's (Fort & Co.'s) assignee.—*Tried in Court of Chancery, January* 16, 17, 28, 1867.—*From Law Journal Reports, vol.* 36, *page* 361.

128. *Ex parte Gibbes, re Whitworth.*—Action in respect to stoppage *in transitu*. Gibbes & Co., Charleston, U.S., sold

144 bales cotton to Whitworth & Co., Luddenden Foot, Yorkshire. Gibbes & Co.'s agent in Liverpool, before arrival of the cotton, sent a bill for acceptance to Whitworth & Co., and on return of that bill of exchange, duly accepted, the bill of lading was handed over to Whitworth & Co. Whitworth & Co. then sent the bill of lading to Mr. Windle, manager in Liverpool for the Lancashire and Yorkshire Railway Company, and he paid freight and sent forward the cotton to Luddenden Foot Station. At this station Whitworth & Co. had a siding into their mill. They unloaded and took from the trucks part of the 144 bales cotton, and used it in manufacture. They then became bankrupt, and Gibbes' agent claimed the bales of cotton from the Railway Company that had not actually passed into Whitworth & Co.'s possession.

Chief Judge Bacon said—"When Mr. Windle, acting as agent for Whitworth & Co., paid the sea charges, which he did on Whitworth's account, he became holder of the bills of lading for Whitworth & Co., and the goods were delivered to him in that character, and there was an end of all *transitus*. The *transitus* that takes place after that is only prescribed by the purchaser; the sender (vendor) has nothing to do with it. The vendor's *transitus* is at an end, and it is in vain to read cases in which, a ship being chartered for London, the goods are not delivered from the ship until the vendor exercises his right of stoppage, or, being chartered for London, the ship is stopped at Copenhagen. All these are familiar instances of stoppage *in transitu*. What can that have to do with the case when it is a case of bargain and sale of goods to be delivered on the wharf at Liverpool on certain conditions being complied with, which conditions are complied with? The delivery takes place, the *transitus* is at an end, and the right at law to stop these goods after that never exists." Judgment accordingly.—*Tried in Court of Bankruptcy, November* 8, 1875.—*From Law Journal Reports, vol.* 45, *page* 10.

Where the Property has Passed to a Third Person by Purchase.

	Case No.		Case No.
Lickbarrow v. *Mason* (1794) ...	129	*Johnson* v. *L. & Y.* (1878)	135
Hurry v. *Mangles* (1808)	123	*Golding Davis* v. *Knight* (1880)	131
Pooley v. *Great Eastern* (1876) ...	130		

DIGEST.

In *Lickbarrow* v. *Mason* (1794) a cargo of corn arrived in Liverpool. Consignee had sold the corn for a valuable consideration, and indorsed bill of lading to purchaser. It was held that the right of stoppage *in transitu* was lost unless fraud could be proved.

In *Hurry* v. *Mangles* (1808) Defendant, a warehouseman, sold oil lying in his warehouse to J. S. on a bill for six months. J. S. sold the oil *bonâ fide* to Hurry (Plaintiff), and Hurry paid warehouse rent, but did not remove the oil. J. S. became bankrupt, and hence his bill was of no value, and Defendant refused to give up the oil to Hurry. Lord Ellenborough held the acceptance of the warehouse rent by Defendant was a complete transfer of the goods to the purchaser. This was an executed delivery from the seller to the buyer.

In *Pooley* v. *Great Eastern* (1876) a quantity of tramway rails were consigned by Plaintiff to his order at Ipswich. Pooley transferred the rails to Jeffrey & Co., and Jeffrey & Co. transferred them to Davis as security for a loan of £150. Jeffrey & Co. paid sender £123, and gave a bill for the difference, but, by becoming bankrupt, could not pay the bill. The Company wrote Davis—"I have yours of yesterday, enclosing transfer of rails, and I beg to say I hold them to your order." Chief Baron Kelly held that this was a recognition of Davis's claim to the rails. The Company then holding the rails on account of Davis, the Plaintiffs (senders) lost their right of lien as unpaid vendors, and are not entitled to recover.

In *Johnson* v. *L. & Y.* (1878) the Company handed back

to senders 38 railway waggons, taking from senders an indemnity. Senders consigned the waggons to Lockwood, and Lockwood transferred them to Johnson. Now Johnson refused the waggons, but gave the Railway Company notice *not to deliver them except to his order*. The Company having had Johnson's order to hold the waggons for him, the *transitus* was at an end. Judgment against Company for £646.

In *Golding Davis* v. *Knight* (1880) caustic soda was sold by Golding Davis to Knight, and Knight resold to Taylor & Co. Before the ship into which the soda was loaded had sailed, Knight stopped payment. Golding Davis gave the captain notice of stoppage *in transitu*, although the soda had been delivered in Taylor's name. Taylor paid the value of the soda into a bank, and Knight's assignee now sought to recover same. Lord Justice James held that Plaintiff was entitled to judgment.

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129. *Lickbarrow* v. *Mason*.—Action in respect to stoppage *in transitu* of a cargo of corn from Middleburgh, in Zealand, to Liverpool. The consignee, to whom the corn was consigned on bill of lading, had sold the corn and indorsed the bill of lading.

Bills of lading are transferable and negotiable by the custom of merchants; and though a sender may in general stop goods *in transitu* before they reach the consignee, yet he cannot if the consignee have previously indorsed over the bill of lading to a third person for a valuable consideration, and without fraud. —*Tried in Court of King's Bench, July* 2, 1794.—*From Durnford and East's Term Reports, vol.* 5, *page* 683; *also in Smith's Leading Cases, vol.* 1, *page* 646, *4th edition.*

130. *Pooley & Co.* v. *Great Eastern Railway Company.* —Action for £227 for a quantity of tramway rails, consigned from Newport to Ipswich to the order of Plaintiffs, Pooley & Co. It appeared Pooley & Co., after the arrival of the rails, sold them to Jeffrey & Co., who paid £123 cash, and gave a bill, due 13th July, for the difference. Jeffrey & Co. subsequently became insolvent, and could not pay the bill. Before their

insolvency they borrowed £150 from a Mr. Davis, and gave him as security a transfer of the rails. Pooley & Co. on 14th April gave Jeffrey & Co. the advice note of the rails, indorsing it, "Please deliver above-mentioned goods to Jeffrey & Co.," but no penny stamp, properly cancelled according to Stamp Act, was put on the advice note. On 24th April Jeffrey & Co. handed over the advice note to Davis with a second indorsement, viz., "Deliver to the order of Davis the within rails." On this occasion no stamp was put on the transfer, as required by law. The Company demurred to recognise Davis's claim to the rails because of the absence of stamps, and said the transfer was invalid; however, on Davis giving them an indemnity, they ultimately delivered the rails to him.

The case was first tried before Chief Baron Kelly at London Sittings, 1875 (Trinity), and a verdict was given for the Company. The Plaintiffs had to pay the penalty under the Stamp Act for the omission to put stamps on the transfer before the said transfer advice note could be received as evidence.

The Plaintiffs appealed, and on the appeal case Chief Baron Kelly said—"There is no doubt that where goods have been sold by one person to another, which goods are at the time in the hands of a third person, and a delivery order is given by the seller to the purchaser—of which the purchaser gives notice to the person in whose hands the goods are deposited—if that third person *attorns* (agrees to the transfer) to the purchaser, then all rights whatsoever, whether of stoppage *in transitu*, lien, or otherwise, on the part of the original seller, are at an end. Did the Company attorn to Davis, and so take upon themselves the legal obligation to deliver the goods to him? That turns upon the Company's letter of 15th May to Davis. The letter begins—'I have yours of yesterday, enclosing transfer of rails, and beg to say I hold them to your order.' Now, if the letter had stopped here, there is no doubt it would have been a complete and perfect attornment; but it goes on, 'but you will please produce this order when applying for the rails, and which order must also bear a transfer stamp by both parties transferring the goods, in accordance with the Act of Parliament. You will be aware they remain here at owner's risk, and subject to our usual rent charges.' I think, therefore,

the letter of the 15th May did amount to an attornment, as far as regards any rights the Plaintiffs may have had, and that from the date of that letter the Company held the goods no longer on account of the Plaintiffs, but of Davis. That being so, the Plaintiffs lost their right of lien as unpaid vendors, and are not entitled to recover in this action. The condition with regard to the transfer stamp was one which the Company might have dispensed with at any time, and yet by so doing they would have conferred no right on the Plaintiffs. They might have accepted the delivery order at once, and, upon receipt of it, they might have taken their chance of being subjected to a penalty under the Act, and have delivered the goods to Davis." (Davis did, on the Company's objection, put two penny stamps on the transfer order, and marked them with a cross as a cancellation; but the Judge held that the Act required the parties' names or initials to be written across the stamps, and unless that be done they are not cancelled within the meaning of the Act.) Barons Cleasby and Pollock concurred. Judgment for Company.—*Tried in Court of Exchequer, April* 27 *and* 28, 1876.—*From Law Times Reports, vol.* 34, *page* 537.

131. *Golding, Davis, & Co.* v. *Knight & Co.*—Action in respect to a stoppage *in transitu*. Golding, Davis, & Co. sold Knight & Co. 1,200 drums of caustic soda. Knight & Co. resold these to Taylor & Son. Golding, Davis, & Co. delivered the soda in the name of Taylor & Son on board a ship in Liverpool to go to New York. No payment had been made by either firms. Before the ship sailed Knight & Co. stopped payment, and Golding, Davis, & Co. gave the captain of the ship notice of stoppage *in transitu*. Knight & Co.'s assignee claimed the value of the soda from Taylor & Co. Taylor & Co. paid the amount into a bank in joint names to await the decision of the Court. Mr. Registrar Pepys, acting as Chief Judge, held the *transitus* was at an end as between Golding, Davis, & Co. and Knight & Co. by the shipment of the goods, the bill of lading having transferred the property to Taylor & Sons.

On appeal, Lord Justice James said that, where a consignee (buyer) of goods has sold the goods to a sub-consignee (buyer), so long as the transit *originally contemplated* between

sender and consignee continues, the original unpaid sender's right of stoppage *in transitu* exists, subject to the sub-consignee's intermediate equity to have the goods on paying for them (as was done in this instance).—*Tried in Court of Appeal, January* 22 *and February* 12, 1880.—*From Weekly Reporter, vol.* 28, *page* 481.

What is Actual Delivery and what is Constructive Delivery.

	Case No.		Case No.
Bolton v. *L. & Y.* (1866)	116	*Re M'Laren, ex parte Cocper* (1879)	120
Ex parte Gibbes, re Whitworth (1875)	128	*Ex parte Rosevear Co., re Cock* (1879)	121

DIGEST.

In *Bolton* v. *L. & Y.* (1866) consignee's carter took part of the goods from the station in mistake, but at once returned them. Chief Justice Erle said—"Consignee refused to take the goods, and the goods delivered from the station to his mill were delivered contrary to his instructions by his carter, and it was the same as if a wrongdoer had taken them and then they had been brought back." Justice Willes said—"It has been said that a delivery of a part is a delivery of the whole; but that decision has been dissented from, and it has been said that it is only so when the delivery of the part is in course of delivery of the whole, and the taking possession of that part is then an acceptance of *constructive* possession of the whole. The mistake of the carter had no effect on the rights of the parties, as it was not a taking possession by the buyer of a part of the goods."

In *Ex parte Gibbes, re Whitworth* (1875) part of a consignment of cotton had been delivered into consignee's mill over his siding from the Company's station, and part of the cotton lay in railway trucks in the station. Gibbes, the seller, desired to stop this portion *in*

transitu. Chief Justice Bacon held that when the carrier (Company) paid the sea charges on the cotton from America for Whitworth in Liverpool, and got the cotton from the ship, there was an end of the *transitus* as far as Gibbes was concerned.

In *Re M'Laren, ex parte Cooper* (1879) out of 114 tons of castings 30 tons had been delivered before the notice of stoppage *in transitu* had been given. Lord Justice Brett said—"Part delivery of a cargo, or of the bulk of the goods, is not *primâ facie* delivery of the whole," and that the *transitus* of the remainder of the castings had *not* ended.

In *Ex parte Rosevear Clay Company, re Cock* (1879) it was held that delivery of goods by a vendor (sender) on board a ship chartered by the purchaser is only constructive and not actual delivery to the purchaser, inasmuch as the contract with the master of the ship to carry the goods does not make him the agent of the purchaser.

CARRIER CANNOT CONVERT HIMSELF INTO A WAREHOUSEMAN OF THE GOODS WITHOUT CONSIGNEE'S AUTHORITY.

	Case No.		Case No.
James v. *Griffin* (1837)	114	*Ex parte Barrow, re Worsdell* (1877)	119
Bolton v. *L. Y.* (1866)	116		

DIGEST.

In *Bolton* v. *Lancashire and Yorkshire* (1866) Chief Justice Erle said—"A carrier may be a warehouseman of goods arrived at their destination, but to constitute him such there must be a change from the capacity of carrier to that of warehouseman, and that cannot take place unless the parties intend it."

In *Ex parte Barrow, re Worsdell* (1877) the *semble* was that a wharfinger holding goods *in transitu* cannot turn himself into an agent for the consignee, so as to put an end to the *transitus*, without the express authority of the consignee. (See also *James* v. *Griffin.*)

WHERE CONSIGNEE CUSTOMARILY MAKES CARRIER'S WAREHOUSE HIS REPOSITORY OR STORE FROM WHICH TO SELL OR SHIP THE GOODS.

(See "Circumstances under which the Transitus is at an End.")

CONSIGNEE CAN COUNTER-ORDER AND RE-CONSIGN GOODS AT ANY PART OF THE JOURNEY.

	Case No.		Case No.
Scothorn v. *S. S.* (1853)	132	*L. & N. W.* v. *Bartlett* (1861)...	232

DIGEST.

In *Scothorn* v. *S. S.* (1853) goods were consigned and invoiced from Great Bridge to London for "Scothorn & Co., to the East India Docks, passenger ship 'Melbourne,' Australia." Consignee went to Euston Station, and left with a Company's clerk there the railway receipt, across which was written, "Send the boxes, &c., to Scothorn, engineers, Bell Wharf, Ratcliffe, London." The clerk agreed to do this. The boxes, however, were delivered to the "Melbourne," and went to Australia, and were lost. Baron Platt held—"If a carrier undertakes to carry goods from one place to another, it is subject to a countermand at any part of the journey, though the owner may be bound to pay for the whole distance."

In *London and North Western* v. *Bartlett* (1861) 28 quarters wheat were sent to Birmingham at S. to S. rate, but sender paid 1s. 6d. per ton extra for its delivery to consignee's mill. Consignee had established a usage that his wheat was to remain at the station. The wheat in question was never delivered to the mill, and was deteriorated, and returned to sender (Defendant). Chief Baron Pollock, on appeal, held—"It is quite clear that the consignee of the goods may receive at any stage of the journey, and I think if sender directs goods to be delivered at a particular place, it is no contract to deliver the goods at that place, and not elsewhere. The contract is to deliver

the goods there unless the consignee shall require them to be delivered at some other place." Judgment for carrier.

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132. *Scothorn* v. *South Staffordshire Railway Company.*—Action for the value of certain goods wrongly sent to Australia. Plaintiff delivered the goods at the Great Bridge Station, and paid the carriage to London. The goods were addressed, "Scothorn & Co., to the East India Docks, passenger ship 'Melbourne,' Australia." While the goods were in transit, one of the Plaintiffs arrived in London, and, finding no berths could be had on the "Melbourne," went to Euston Square Station, and left with a clerk the receipt, across which was written, "Send the boxes, &c., to Scothorn & Co., engineers, Bell Wharf, Ratcliffe, London." The clerk said the boxes should be safely delivered according to this address on the following day, and there would be no additional charge. The boxes, however, were sent to Australia and lost. The Company contended their contract was to deliver on board the "Melbourne," which they did, and they were not bound by what took place between the Plaintiff and the London and North Western Company's clerk. The Judge left it to the Jury whether the clerk had authority to receive the countermand. The Jury being of that opinion, the Judge directed a verdict for Plaintiff, reserving leave to move to enter a non-suit.

On the re-hearing, Baron Anderson admitted the original contract was to deliver to the "Melbourne," but seeing that the London and North Western Company were the agents of the contracting Company, and the reception of the countermand being part of the contract itself, it should not by negligence have been disobeyed. The Company's contract was to procure their agent to deliver according to the Plaintiff's directions, and that they had not done. Baron Platt—"If a carrier undertakes to carry goods from one place to another, they are subject to a countermand at any part of the journey, though the owner may be bound to pay for the whole distance. The clerk at Euston was the contracting Company's agent to receive the countermand." Baron Martin agreed, and argued in the

same direction.—*Tried at the Court of Exchequer, January* 22, 1853.—*Exchequer Reports, vol.* 8, *page* 341; *also Law Journal Reports, vol.* 22, *page* 121 (*Exchequer*).

WHERE CONSIGNEE HAS BECOME A BANKRUPT, OWING THE CARRIER A LEDGER ACCOUNT FOR PREVIOUS CARRIAGE: WHETHER THE CARRIER'S LIEN OR THE SENDER'S STOPPAGE IN TRANSITU TAKES PRECEDENCE.

(See also Carrier's Lien.)

	Case No.		Case No.
Richardson v. *Goss* (1802)	110	*Pott* v. *L. & N. W.* (1858)	133

DIGEST.

In *Richardson* v. *Goss* (1802) 3 hhds. of hams came from Newcastle to London, and were lodged in Defendant's warehouse, being consigned to Wilson. Wilson became bankrupt, and wrote sender (Richard, son) he would not take the hams, and thus rescinded the purchase. Goss had no advice of this, and having an old balance due from Wilson, detained the hams. The Court held the contract of purchase had been rescinded, and Goss could not hold the hams from Richardson (sender), although he might have done so against Wilson by the custom of a warehouseman's lien for an old balance.

In *Pott* v. *L. & N. W.* (1858) the goods were sent, London to Bradford. The London and North Western were the contracting Company, and the Midland Company the terminal carrier. Consignee had failed, owing the Midland Company a balance of a ledger account, and that Company detained the goods for same. Sender issued to London and North Western Company a notice of stoppage in transit. The Judge gave Judgment against the Company, who were responsible for the charge of the goods through their agents (Midland Company) until the delivery to consignee had been made actually or constructively.

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133. *Pott* v. *London and North Western Railway Com-*

pany.—Claim by senders for the value of six casks vinegar, London to Bradford. The casks were carried by London and North Western Company from London, and the Midland Company completed the carriage to Bradford. Consignee failed at the end of 1857, owing Midland Company a debt on a ledger account for carriage. The casks were sent in January, 1858, and the Midland Company detained them as a lien for their debt. Plaintiffs (senders) sued the London and North Western Company, and the Midland Company defended the action. Plaintiffs pleaded their contract was with London and North Western Company, and the lien of the Midland Company was no answer to the claim, and that the Midland Company had no right to such lien. Senders proved issue of a notice to stop delivery of goods to consignee. The Company pleaded Plaintiffs' right of stoppage *in transitu* was gone at the time their notice reached Bradford, because the *transitus* was then at an end. The Judge quoted the case of *Scothorn* v. *South Staffordshire Company* (8 Exchequer, 341; 22 L. J., Exchequer, 121), which he considered applicable, and that Defendants (London and North Western Company) were bound by their contract to act upon the notice of senders so far as to hold the goods thenceforth at their disposal. They answered that the goods had passed into the charge of a third party, who had a lien upon them. The Company (London and North Western) ought to have had the goods at the disposal of the senders, and are answerable for having parted with the control of them. Verdict for Plaintiff.—*Tried, County Court, Southwark, early in* 1858. (N.B.—The question of legal ownership does not seem to have been raised, nor who paid the carriage. The case turned on the contracting Company not having the lien.)

WHERE SENDER EXERCISES HIS STOPPAGE IN TRANSITU, AND THE CARRIER DELIVERS HIM THE GOODS BACK AGAIN, WITH OR WITHOUT AN INDEMNITY.

	Case No.		Case No.
Foster v. *Frampton* (1826)... ...	125	*Clough* v. *L. & N. W.* (1871) ...	134
Bolton v. *L. & Y.* (1866)	116	*Johnson* v. *L. & Y.* (1878)... ...	135

DIGEST.

In *Foster* v. *Frampton* (1826) the carrier, on a bond of indemnity, delivered the sugar back to sender. It appeared consignee had sampled the sugar and told the carrier to keep the casks in his warehouse for him. Justice Bayley held that from that time the carrier became the warehouseman of the consignee (bankrupt), and the goods were as much in possession of the latter as if he had taken them into his own warehouse.

In *Bolton* v. *Lancashire and Yorkshire* (1866) the Company delivered the goods back to sender. (*See under* "*Circumstances under which the Transitus is still in Course.*")

In *Clough* v. *London and North Western* (1871) the Company delivered back to senders nine pianos. The consignee called at the Liverpool Station, and the Company *agreed with him to hold the pianos no longer as carriers, but as warehousemen for him.* A man named Adams had purchased the pianos in London from sender, paying £68, and giving a bill for the difference at four months. Adams consigned the pianos to Clough at Liverpool. Adams and Clough had combined to commit a fraud. Seeing there was fraud, the Company, on a very nice point, were, in the Exchequer Chamber, held not liable. (See Judgment.)

In *Johnson* v. *Lancashire and Yorkshire* (1878) the Company handed back to senders 38 railway waggons, taking from senders an indemnity. Senders consigned the waggons to Lockwood, and Lockwood transferred them to Johnson. Now Johnson refused the waggons, but gave the Railway Company notice *not to deliver*

them except to his order. The Company having had Johnson's order to hold the waggons for him, the *transitus* was at an end. Judgment against Company for £646.

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134. *Clough* v. *London and North Western Railway.*—Action for £205, value of nine pianos, London to Liverpool. A person named Adams negotiated the purchase of the pianos from senders (London Pianoforte Company) for £68 cash and a bill at four months for the difference. The pianos were stated to be for exportation, and by Adams' order were consigned to R. C. Clough, Liverpool (the Plaintiff). In the course of the trial it came out that Adams and Clough were legally guilty of fraud in the purchase of the pianos. The £68 was advanced by Clough to Adams, and it was a concerted plan to get the pianos and sell them by auction, and never pay any further money than the £68. At the time the pianos reached Liverpool Clough could not be found at the address given on invoice, and the Railway Company advised senders, requesting further instructions. Almost at the same time senders heard Adams was a bankrupt, and at 9.30 a.m. on 22nd May senders sent directions to the Railway Company's London office to stop the pianos *in transitu*. The Company, however, did not telegraph orders to Liverpool at once, and before the order reached Liverpool by train the Plaintiff called at the Liverpool Station, *and enough took place between him and the Company to put an end to the* transitus, *the Company agreeing with him to hold the pianos no longer as carriers, but as warehousemen for him.* The senders required the Company to send the pianos back to London to them, and, on receiving an indemnity from senders, this was done. On 2nd June Clough, finding the Company had returned the pianos to senders, issued a writ against the Company for the value. Adams, in cross-examination, stated that a document given in evidence, by which he acknowledged to have received £250 from Clough as an advance on the pianos, was part of the fraud.

The case was tried before Justice Lush, Winter Circuit, 1868, and he left three questions to the Jury—(1) Did Adams obtain the goods with the intention of not paying for them?

(2) Did the Plaintiff in fact advance the £250? (3) Did he at the time he advanced it know of the fraudulent intention of Adams? The Jury found—(1) That Adams did so obtain the goods; (2) that the Plaintiff did advance the money, but not *bonâ fide;* (3) that he did know of Adams' fraudulent intention. Verdict was then entered for the Company. Leave to appeal was given.

The Court of Exchequer, on appeal, gave Judgment for Plaintiff, £205, setting aside the previous verdict; which Judgment was subsequently made absolute on 23rd April, 1869, on the ground that, in order to enable the senders to rescind the contract of purchase and sale on the ground of fraud, it was necessary they should do some act indicating their intention to rescind before or independent of delivering a plea, and that such act should have been accompanied by an offer to hand over to Adams the £68 and the bill, which they had no right to retain after the contract was voided.

Plaintiff then appealed to the Exchequer Chamber, when Justice Mellor delivered the Judgment of the Court. He said —"We agree completely with all the Judges below, that the property in this case passed from the senders to Adams by the contract of sale. The fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. We think that the party defrauded may keep the question open so long as he does nothing to affirm the contract. So long as he has made no election he retains the right to determine it either way, subject to this—that if, in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property; or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. It seems to us clear in principle that a statement in a plea by the party from whom the property passed, that he claims back the property on the ground that he was induced to part with it by fraud, is as unequivocal a determination of his election to avoid the transaction as could

well be made. It is, however, quite true that no man can at once treat the contract as voided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it; and therefore the senders, on rescinding the contract, were bound to restore to Adams the money and the acceptance which they had obtained from him. The only ground upon which the Jury could have been asked to find that the senders had affirmed the contract was that they pleaded and relied upon a plea of stoppage *in transitu*, which, if they could have proved it, would have entitled them to resume the vendor's lien for the unpaid balance of the price, without parting with the cash already paid, and which was, therefore, so far inconsistent with a plea of rescission for fraud, the legal consequences of which would be that they could not retain the money." Judgment for Company, reversing previous Judgment.—*Tried in Court of Exchequer Chamber, June* 17, 19, *and Dec.* 2, 1871.—*From Law Journal Reports, vol.* 41, *page* 17; *also Law Times Reports, vol.* 25, *page* 708; *and Law Reports,* 7 *Exch., page* 26.

135. *Johnson* v. *Lancashire and Yorkshire Railway Company and Wigan Waggon Company.*—Action for £646 for 38 waggons, at £17 each, wrongly delivered back to the senders. The Wigan Waggon Company (one of Defendants) contracted to supply Lockwood & Co. with 100 waggons according to pattern, and Lockwood contracted to supply same to Johnson (Plaintiff). After the contracts were made it was subsequently agreed the Waggon Company should charge Johnson direct with the contract price (Lockwood probably getting a commission). The Railway Company (Lancashire and Yorkshire) received the waggons consigned to Johnson. Now Johnson, considering the waggons not up to pattern, refused them, *but gave the Railway Company notice not to deliver except to his order.* Johnson at the same time gave Lockwood notice the waggons were not up to sample, but he would dispose of them at the best possible prices, and hold them responsible. The waggons being allowed to remain an unreasonable time blocking up the Railway Company's premises,

they, on getting an indemnity from senders, delivered the waggons back to senders, the Wigan Waggon Company. Johnson's action was against the Railway Company and Waggon Company (Defendants) for conversion of his property in the waggons. The case was tried at the Yorkshire Assizes, before Justice Denman, who gave Judgment as follows:—"The Jury had found that Lockwood rejected the waggons, and it was contended the Plaintiffs could not recover, as they could have no property in the goods which had been rejected by their vendors, who had not been paid. The Railway Company throughout held the goods to the order of Johnson, and that after notice from Johnson not to deliver to anyone without their order, they, the Railway Company, delivered the waggons back to senders. So far as the Railway Company are concerned, it is therefore clear that there is no defence to the action. I think the Waggon Company had no control over the goods after they were once delivered to the Railway Company to the order of consignees. As against the Waggon Company the property in the goods had passed to consignee. I think, therefore, Plaintiffs are entitled to recover from both Defendants." The Judge was of opinion Plaintiffs were only entitled to £133, being profit at the rate of £3 10s. per waggon. The contention by Plaintiff that he was entitled to the full value, £646, was a question reserved for further consideration.

An appeal was taken to the Court of Common Pleas, when Justice Denman delivered Judgment, and said—"I am of opinion Plaintiffs are entitled to recover the value of the waggons at the time of the conversion, viz., £646. It is laid down in all the text books and authorities that where goods are unlawfully converted the proper measure of damages is, *primâ facie*, the full value of the goods. The Railway Company, indemnified by the Waggon Company, hand back to them the waggons which they held to the order of the Plaintiffs, *after* informing the Waggon Company that they could do nothing without the Plaintiffs' authority." Judgment for Plaintiffs, £646.—*Tried in Court of Common Pleas, July* 3, 1878.—*From Law Times Reports, vol.* 39, *page* 448.

DELAY TO GOODS.

RECOVERY OF DAMAGES—PROSPECTIVE PROFIT—DAMAGES TOO REMOTE—MEASURE OF DAMAGES.

	Case No.		Case No.
Black v. *Baxendale* (1847)	136	*Wilson* v. *L. & Y.* (1861)	141
Hadley v. *Baxendale* (1854)... ...	137	*Hales* v. *L. & N. W.* (1863)... ...	142
Hearn v. *L. & S. W.* (1855)... ...	79	*G. W.* v. *Redmayne* (1866)	143
Scully v. *G. S. & W.* (1855)... ...	138	*Woodger* v. *G. W.* (1867)	144
Gee v. *L. & Y.* (1860)	140	*Levine* v. *G. W.* (1868)...	236
Le Peinteur v. *S. E.* (1860)	139		

DIGEST.

In *Black* v. *Baxendale* (1847) five bundles hay-cloths were four days in transit, London to Bedford. The sale was consequently lost, and 10s. expense arose in sending them to St. Neots for sale. A clerk who went down to Bedford specially lost his time, and was at 20s. per day expenses. The Chief Baron told the Jury they were at liberty to give these expenses as damages. Verdict £10. This was confirmed on appeal, but the amount was considered too much. (Chief Justice Bovill, in *Woodger* v. *Great Western*, remarked in substance that *Hadley* v. *Baxendale* overruled this decision.)

In *Hadley* v. *Baxendale* (1854) an iron shaft for a flour mill was delayed five days, Gloucester to Greenwich, and £300 was claimed for profits, the miller having had to buy flour to supply his customers. Baron Alderson said—"When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may, fairly and reasonably considered, either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the

probable result of the breach of it." A new trial was ordered, which was practically a victory for Pickford & Co. (Baxendale).

In *Hearn* v. *London and South Western* (1855) the action was for £30 for replacing and substituting title deeds and leases lost from 3rd June to 23rd September in a portmanteau, passenger's luggage, London to Southampton. The appeal case decided the Carriers' Act protected the Company. From the first trial it appeared if the portmanteau had never been found the Carriers' Act would have protected the Company.

In *Scully* v. *Great Southern and Western* (1855) a sum of £40 was claimed, owing to a sample parcel of corn arriving a few hours late in Dublin, after the close of the Corn Exchange. Chief Justice Lefroy said—"No intimation was given to Company of any importance as to hour or time of delivery." Held—The Company were not liable, and reversed Assistant Barrister's decree for Plaintiff.

In *Gee* v. *Lancashire and Yorkshire* (1860) ten bales cotton were delayed seven days, and a new mill could not be started. Damages claimed were—(1) Wages paid workpeople, £7; (2) seven days' rent of mill, £3 10s.; (3) interest on £8,000 capital invested, £2 10s.; (4) loss of profits, £7 10s. The verdict was for the Company, and the Chief Baron said—"Plaintiffs appear to have postponed the purchase to the latest possible moment, and then seek to make the Company responsible for the delay. Plaintiffs should have said at the time of delivery the cotton was wanted for a special purpose, and that, in case of delay, the Company would be charged with rent, profit, and loss."

In *Le Peinteur* v. *South Eastern* (1860) French kid skins, to make 200 pairs gloves, were delayed fourteen days. Plaintiff claimed £6, actual damage to skins; £7 10s., workmen's wages; £50, profit on loss of sale. The Court of Queen's Bench held that the first item of £6 could be recovered, but that the other two amounts were not recoverable.

In *Wilson* v. *L. & Y.* (1861) cloth to make caps was detained, March 15 to April 12, and when it arrived at destination the period had passed for making caps for the spring season, and hence cloth was worth only £130 instead of £230. The Judge told the Jury that in calculating damages they might take into consideration "the loss of the season." Verdict, £80. On the appeal, Justice Williams seemed to think the expression "the loss of the season" somewhat equivocal, and the damages were reduced to £40.

In *Hales* v. *L. & N. W.* (1863) a Forester's regalia was sent on hire (£20), London to Seaham Harbour, for a procession on a particular day. The regalia arrived too late. The Jury gave a verdict for £25 (£5 for personal expenses in looking after and tracing the goods). Chief Justice Cockburn, on appeal, reversed the decision as to the £20, reducing the damages to £5. Where no time is mentioned for delivery of goods carried, the obligation of the carrier is to deliver within a reasonable time, and that is a question of fact.

In *G. W.* v. *Redmayne* (1866) a parcel of clothing was delayed two days over the usual time, Manchester to Cardiff. Plaintiff's traveller went to Cardiff to sell the clothes, and owing to the delay the goods had to be sent after him. The County Court Judge included the profits in the damages the Plaintiff would likely have made on a possible sale. Chief Justice Erle, on appeal, reversed this decision, and held such profits were not recoverable.

In *Woodger* v. *Great Western* (1867) a commercial traveller claimed two days' hotel expenses in Liverpool waiting for his patterns from Oxford, which left Oxford the Thursday before Good Friday, and were not delivered in Liverpool until the Wednesday. Justice Lush said to Jury—"If you think there was undue delay you will find the Company guilty of negligence, and then the result of that will be damages 1s., the goods themselves being in as good condition as they would have

been if he had got them on the Monday. The Company are not responsible for hotel expenses, because they could not know that the Plaintiff was in Liverpool on the Monday wanting these things." Verdict, 1s. for delay, which Chief Justice Bovill, on appeal in Common Pleas, confirmed.

In *Levine* v. *Great Western* (1868) a truss, consigned "till called for," was delayed. Consignee applied for it on November 20, and, being a hawker, waited until November 29 at Southampton, and then left the town without his truss. Chief Baron Kelly held that Plaintiff in point of law had a right to say to the Company, having waited several days—"I will not now accept them. If you have them here *now*, at this moment, I am ready to take them; but if you have them, not here now, I will not accept them. I will not accept them, for you must keep them yourselves and pay me the value."

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136. *Black* v. *Baxendale.*—Action for delay to five bundles hay-cloths, London to Bedford; goods delivered to carrier on Thursday, 22nd October, 1846, and not at Bedford until the Monday, whereby sale was lost, and Plaintiff's clerk, who went specially down to Bedford, at expenses of 20s. a day, to make sale, lost his time, and was at an expense of 10s. to remove the hay-cloths to St. Neots to make sale. The carrier contended—(1) Not guilty; (2) a traverse of the delivery of the goods; (3) leave and license. The Chief Baron directed the Jury they were at liberty to give these expenses as damages if they should think fit. Verdict of Jury, £10. The carrier moved for a new trial, on the ground of misdirection, alleging—(1) That it was not a reasonable consequence of the breach of the contract that a person should go to Bedford; (2) the carriers were not responsible for the expenses of a person so sent when they had *no notice* for what purpose the goods were sent. The Jury should, therefore, have been directed, as a matter of law, that the Defendant Company were not liable for the expenses. Baron Platt said—"There is no ground for a rule, as there was no misdirection. The Defendants are responsible for all

the reasonable consequences arising from their breach of contract. Whether the clerk's going down and remaining at Bedford three days was a reasonable consequence was a question for the Jury. If he went down unnecessarily, or stayed there too long, the Defendants ought not to be compelled to pay that expense. The Jury have given too large damages, but, being less than £20, we cannot grant a new trial on the ground of the verdict being against the evidence." Judgment for Plaintiff. Chief Baron Pollock and Barons Alderson and Rolfe concurred. —*Tried in Court of Exchequer, November* 6, 1847.—*Exchequer Reports, vol.* 1, *page* 410; *and Law Journal Reports, vol.* 17, *page* 50. (Chief Justice Bovill, in the Case of *Woodger* v. *Great Western Company* (Law Journal Reports, 36, page 177), remarked in substance that *Hadley* v. *Baxendale* superseded this decision.)

137. *Hadley* v. *Baxendale.*—Action against Pickford & Co. for £300 for loss of profits arising from delay to a broken iron shaft of a flour mill, sent as a pattern by which a new shaft might be made; said broken shaft was delayed an unreasonable time, Gloucester to Greenwich. Plaintiffs contended the broken shaft should have been delivered on the second day, whereas it was not delivered until the seventh day. Plaintiffs were five days unable to supply their customers, and had to buy flour, &c., to supply them. Pickford & Co. paid £25 into Court for the delay. Plaintiffs' servant told Pickford & Co.'s clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was that if it was sent up by twelve o'clock any day it would be delivered at Greenwich the following day. Carriage, £2 4s., was paid on delivery, and Pickford & Co.'s clerk told that a special entry, if required, should be made to hasten its delivery. Pickford & Co. contended that the damages were too remote. The Judge left the case generally to the Jury, who gave a verdict for £25 over the £25 paid into Court. A rule was obtained for a new trial, on the ground of misdirection, when Baron Alderson delivered the following Judgment: —"When two parties have made a contract which one of them has broken, the damages which the other party ought to receive

in respect of such breach of contract should be such as may fairly and reasonably considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now we find that the only circumstances here communicated by the Plaintiffs to the Defendants at the time the contract was made were that the article to be carried was the broken shaft of a mill, and that the Plaintiffs were the millers of the mill. But how these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the Plaintiffs had another shaft in their possession, put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it. Suppose that at the time of the delivery to the carrier the machinery of the mill had been in other respects defective, then also the same results would follow. The special circumstances were never communicated to the Defendants. The loss of profits could not reasonably be contemplated by the two parties. The Judge trying the case ought, therefore, to have told the Jury that upon the facts then before them they ought not to take a loss of profits into consideration at all in estimating the damages. There must, therefore, be a new trial in this case." This was practically a victory for Pickford & Co.—*Tried in Queen's Bench, Michaelmas Term*, 1854.—*Exchequer Reports, vol.* 9, *page* 341.

138. *Scully* v. *Great Southern and Western Railway.*—Action for £40, consequential damages for delay to a parcel containing a sample of corn delivered after close of Dublin Corn Exchange, thereby preventing sale of corn on that day.—*Tried before Assistant Barrister, who gave a decree for Plaintiff. Appeal tried before Chief Justice Lefroy at Maryborough, September*, 1855. His Lordship said that no intimation was given to Company, by address on parcel or otherwise, of any importance as to hour or time of delivery. The parcel was delivered to the Company after the train had passed Port-

arlington that would have reached Dublin in time for delivery before opening of Corn Exchange. The parcel was sent by first opportunity after. Reversed degree, and gave Company their costs.

139. *Le Peinteur* v. *South Eastern Railway Company.*—Action for £63 1s. for fourteen days' delay to cases of French kid skins, Folkestone to Worcester. The skins were to be made into gloves. Plaintiff claimed £6 for actual damage done to skins, £7 1s. paid to workmen who were kept out of employment by the non-arrival of the skins, £50 profit on the loss of sale of 200 dozen gloves. The case was first tried at Worcester before Justice Keating, who ruled that the second and third items were not recoverable, and the Jury gave a verdict for £6. Plaintiff appealed; and on the appeal case the Court ruled, in favour of the Company, that the second and third items could not be recovered, the case being governed by *Hadley* v. *Baxendale* (9 Exch., 341), and that a Judgment for Plaintiff could not be given without overruling that decision. Judgment for Company on second and third items.—*Tried in Court of Queen's Bench, April* 19, 1860.—*Law Times Reports, vol.* 2, *page* 170.

140. *Gee* v. *Lancashire and Yorkshire Railway Company.*—Action for £20 10s. for seven days' delay to ten bales cotton, Liverpool to Oldham—(1) Wages paid to workpeople, £7; (2) seven days' rent of mill, £3 10s.; (3) interest on £8,000 capital invested, £2 10s; (4) loss of profits, £7 10s. This was an appeal case from County Court Judge at Oldham, when a Jury, under direction of Judge, gave Plaintiffs a verdict. The bales were purchased at Liverpool on the 24th January, and delivered to Company on the 26th January, and were to start a new mill. The cotton had been sent to Middleton Junction, a mile and a half from Oldham. The Court held the damage did not flow from the non-arrival of the cotton alone, but was the consequence of the non-arrival coupled with the fact that the Plaintiffs had no cotton to resort to. If it could have been made out that every carrier must know that when cotton is delivered to them it is notice that a mill is standing still and waiting for that particular cotton, then the County Court Judge's ruling might probably be right. The Company would have the option of saying—"Then we will not take the

responsibility upon ourselves unless you agree to pay extra for it." The Company are bound to carry goods at a reasonable rate, but not to take such an extra risk as was sought to be imposed upon them. The Chief Baron said Plaintiffs should have said the goods were wanted for a special purpose (at time of delivery), and that in case of delay the Company would be charged with rent, profit, and loss; that the alleged notices amounted to nothing, one being before the contract, and the other after the breach of contract; and that "Plaintiffs appear to have postponed the purchase of the cotton to the latest possible moment, and then seek to make the Defendants responsible for the delay. No man is responsible for any damage he has not reasonable means of foreseeing or guarding against." Verdict for Company.—*Tried in Court of Exchequer, before Chief Baron and Barons Bramwell, Channell, and Wilde, November* 14, 1860.—*From Law Journal Reports, Exchequer, vol.* 30, *page* 11.

141. *Wilson* v. *Lancashire and Yorkshire Railway Company.*—Action for £80 for delay to a consignment of cloth from March 15 to April 12, 1860—Huddersfield to Cockermouth. The cloth was by accident taken to Maryport, and there delayed. The cloth was required for making caps for the spring of 1860, and it arrived too late for that purpose. Had it arrived in time it would have been worth £230, but arriving as it did its value was only £130. The case was tried before Baron Wilde, Liverpool Summer Assizes, 1860. The Judge told the Jury that in calculating the damages they might take into consideration "the loss of the season" by the cloth not arriving in time. Verdict, £80 for Plaintiff. The Company appealed, on the ground that the Jury were not entitled to give Plaintiff the loss of his profits for the season. On the appeal case Justice Williams said—"If, by the expression 'the loss of the season,' the Jury were led to calculate the damage by taking the amount of profits the Plaintiff *might* have made if the cloth had been duly delivered, there would be a failure of justice if the verdict were allowed to stand; but if, by the expression 'the loss of the season,' that from the delay the cloth had become of less value, and had become less marketable, because the time had gone by for finding

customers, or for making it into caps and so disposing of it, we do not think there is any mistake in point of law in the direction to the Jury. We are of opinion, in cases of delay, the consignee is not entitled to recover the profits he would have made if the goods had been delivered in due course. We are of opinion consignee is entitled to recover the difference between the value on March 15 and April 12. Looking at the evidence which was given, and the considerable amount of damages awarded, and looking at the uncertainty of the expression 'the loss of the season,' which might have been understood by the Jury in two ways, I think there would not be substantial justice done without a new trial, unless the Plaintiff were to consent to reduce the damages to £40." Justices Willes, Byles, and Keating concurred. Plaintiff consented to accept the £40.—*Tried in Court of Common Pleas, February* 9, 1861.—*From Law Journal Reports, vol.* 30, *page* 232.

142. *Hales* v. *London and North Western Railway Company.*—Action for £25—£20 loss of hire on three boxes of regalia in use by Foresters' Society, and £5 personal expenses in making inquiries for the missing boxes, London to Seaham Harbour. The boxes were directed to Seaham Harbour, near Sunderland, and delivered in London 7th August. They were sent as a tranship to Normanton, and thence to Newcastle. Had there been a truck-load at Normanton they would have been sent direct to Sunderland, in which case they would have reached their destination on Friday night, August 9. There was a carrier every day from Sunderland to Seaham. The boxes reached Newcastle on the Friday morning, and were detained there until the following Tuesday, and sent by a carrier from there to Seaham, who only travels Tuesdays and Thursdays; consequently the boxes did not reach Seaham until Wednesday, August 14. The Foresters' procession for which the regalia was hired having taken place on Saturday, August 10, the contents of the boxes were of no use when they arrived. The case was first tried before Chief Justice Cockburn, Guildhall Sittings, London, Trinity Term, 1862. The Jury found that (1) it was unreasonable in the Company to send the boxes to Sunderland

by way of Newcastle, and (2) that there was unreasonable delay in sending the boxes on from Newcastle (*via* rail to Sunderland, instead of by carrier direct to Seaham). Verdict for £25. Leave was given for a rule to reduce the damages to £20. On new trial Chief Justice Cockburn said—"The damages must be reduced to £5. Where no time is mentioned for delivery of goods carried, the obligation of the carrier is to deliver them within a reasonable time, and that is a question of fact. The person who sends goods is not entitled to call upon the carrier to go out of his accustomed course, or to use extraordinary means of conveyance; but the carrier must do that which is within his power, and which it is reasonable to expect he should do for delivering the goods. Here the goods arrived at Newcastle, and there was abundant opportunity of sending them on by railway to Sunderland every day, instead of which the Defendants kept them until the carrier could take them to Seaham Harbour. I think the Jury were right in saying that such delay was unreasonable." Justice Wightman concurred. Justice Blackburn said—"The obligation of the carrier to carry depends on his public profession—*Johnson* v. *Midland Railway* (4 Exchequer, 367)—and therefore he is bound to carry only according to the route which he holds out to the public. But then he is bound to deliver in a reasonable time, having regard to that route. It is no breach of his duty that he does not carry by a shorter route than the accustomed one; he (sender) should ask for it (the shorter route), and if refused he would exercise his choice of sending by another carrier. But when goods are sent by the usual route the carrier must use reasonable diligence, and whether he has done so is a question of fact. I doubt whether the Jury were justified in finding that it was unreasonable to send the goods to Newcastle. The Defendants never held themselves out as sending goods to Sunderland except there was a truck-load for Sunderland at Normanton, which was not the fact in the present case. But the Jury have also found that there was unreasonable delay at Newcastle in waiting five days for the carrier instead of sending the goods to Sunderland (as ordered), and I think that there was considerable evidence justifying the Jury in so finding. It is a question of fact, and I see no reason for being dissatisfied with their verdict." Verdict

to reduce the damages to £5.—*Tried in the Court of Queen's Bench, May* 26, 1863.—*From Best and Smith's Reports, vol.* 4, *page* 66.

143. *Great Western Railway Company* v. *Redmayne.*—Action for delay to a parcel of clothing, delayed two days over the usual time, Manchester to Cardiff. Plaintiff's traveller went to Cardiff to sell the goods, and owing to the delay the goods had to be sent after him to the next town. No notice had been given to the Company as to the object for which the goods were sent. The County Court Judge of Lancashire decided for Plaintiff, and included in the damages the profits which the Plaintiff would have probably made by the sale of the goods at Cardiff.

On the appeal case Chief Justice Erle held that the market value of the goods was their value in the market independently of any circumstances peculiar to the Plaintiff, and that the profits that would have been made by the sale of the goods at Cardiff, through the Plaintiff's traveller, could not be recovered. Judgment for Company.—*Tried in Court of Common Pleas, January* 25, 1866.—*From Law Reports, Common Pleas, vol.* 1, *page* 329.

144. *Woodger* v. *Great Western Railway Company.*—Action by a commercial traveller for two days' hotel expenses at Liverpool, owing to delay to his patterns from Oxford, and loss of some goods out of package. The case was first tried before Justice Lush, who, in summing up the case to the Jury, said—"The two questions are—(1) Do you think that this package was delayed an unreasonable time on the road? (2) Whether you think the articles were lost out of the package while in the custody of the Company? I hold that the Company are not responsible for any special damage which the Plaintiff has sustained, on this broad principle—If you want to make a carrier liable for negligence in delivering goods, you must give the carrier notice of what you want the goods for, that you want them at a given town by a given day; then you put on him extra care. It has been long decided that if you deliver a package to a carrier to carry without telling him of any extraordinary consequences that will ensue to you if it is not

delivered by a given time, you cannot recover any special damages arising from delay. If the goods are injured by reason of their delay you may recover their loss of value. That is the case when goods fit only for a particular use at a given time are so long delayed that they do not come until the season is over; at that time they would be of much less value. But this is not a case of the kind; these goods intrinsically are of as much worth now as when they were delivered to the Defendants, and you cannot recover for their having been delayed, because the Company could not know they were so essential to the Plaintiff on the Saturday or the Monday, or the consequences to him if they were not delivered. Therefore the Plaintiff cannot recover the special damage because the goods had been delayed. If you find there was delay then he would be entitled to nominal damages, but I do not think to more, because the goods are equally as valuable in themselves. (N.B.—The package left Oxford the Thursday before Good Friday, and was not delivered in Liverpool until the Wednesday.) If you think there was undue delay you will find the Company guilty of negligence, and then the result of that will be damages 1s., the goods themselves being in as good condition as they would have been if he had got them on the Monday. The Company are not responsible for hotel expenses, because they could not know that the Plaintiff was in Liverpool on the Monday wanting these things." The Jury gave a verdict for 1s. for the delay, and Plaintiff's counsel, through the Judge, got the Jury to fix £5 hotel expenses as a reasonable sum if same might on appeal be held legally recoverable. Plaintiff appealed to the Court of Common Pleas, when Chief Justice Bovill said—" I cannot see how these expenses are recoverable, and I am of opinion the learned Judge was right. This case is decided by *Hadley* v. *Baxendale*. The case of *Great Western Railway Company* v. *Redmayne* decided that special profits are not recoverable, and it is a strong authority against the Plaintiff, as special profits have a much nearer connection with the matter than hotel expenses." Justice Montague Smith concurred. Judgment for Company.—*Tried in Court of Common Pleas, January* 26, 1867.—*From Law Journal Reports, vol.* 36, *page* 177.

DELAY AND LOSS OF MARKET WHERE NO SPECIAL CONTRACT WAS SIGNED.

(See also under "Common Carriers' Liability as Insurers"—"Special Contracts"—"Special Conditions where a Delay or Loss of Market arises.")

	Case No.		Case No.
Walker v. *Y. & N. Mid.* (1853) ...	145	*Finlay* v. *North British* (1870) ...	150
Dunham v. *L. & N. W.* (1856) ...	146	*Horn* v. *Midland* (1872)	255
White v. *Great Western* (1857) ...	147	*Gallagher* v. *Great Western* (1874)	168
Wren v. *Eastern Counties* (1859)	157	*Simpson* v. *L. & N. W.* (1876) ...	151
Beal v. *S. D.* (1860)	148	*Webb* v. *Great Western* (1877) ...	152
Lord v. *Midland* (1867)	149	*Goldsmith* v. *Great Eastern* (1881)	153

The above cases following the Digest are cases of *delay* of two kinds—(1) Where a special contract was involved; (2) where no special contract was involved.

DIGEST.

In *Horn* v. *Midland* (1872) a quantity of shoes for soldiers were delayed from the evening of February 3 to the morning of February 4. Consignee refused the shoes, as the date of contract (February 3) had expired, and the war having ended the shoes were not required. The Company were held not liable, as they had not been warned on the acceptance of the contract that there were any peculiar circumstances which rendered delivery at a particular time of importance.

In *Goldsmith* v. *Great Eastern* (1881) damages, £5, were claimed for delay to two bags clover seed, delayed from March 18 to April 1, owing to delivery to the wrong person. The seed was received too late for the spring sowing season. The Court of Queen's Bench confirmed the County Court decision—"That the delivery of the seed by the Company to a wrong person, when conveyed by them at owner's risk, amounted to wilful misconduct, because it was gross carelessness." Judgment against Company.

145. *Walker* v. *York and North Midland Railway Company.*—Action for loss of market. On 3rd September, 1852, Plaintiff sent 25 barrels fish, Scarborough to Manchester, and they arrived too late for the market. The Company pleaded a special contract. A short time before the Company

had served sender and other fish dealers with a printed notice with the following conditions :—

"1. The sender to undertake all risk of loading, unloading, or carriage, whether arising from the negligence or default of this Company or their servants, or from defects or imperfections in the station, platform, or other place of loading or unloading, or for the carriage, engine, train, or railway in, by, or upon which the fish may be conveyed, or from any other cause whatever.

"2. This Company is not to be responsible for the delivery of fish in any certain or reasonable time, nor in time for any particular market, nor are they to be required to carry or forward by any particular train, nor are they to be responsible for loss or damage arising from any delay or stoppage, however occasioned.

"3. Fish booked for places beyond the limits of this Company's line will only be carried by them, so far as their line is concerned, on the above conditions, and afterwards delivered to some other Company or person upon the same terms and conditions as are herein stipulated for as regards this Company.

"4. The station clerks and servants of the Company have no authority to alter or vary these conditions."

Plaintiff received one of the notices, and went to the station-master, Scarborough, and said—"What is the use of sending that old fellow down to serve these notices? they are of no use whatever;" and he added that it was not binding upon him. The case was first tried at the London Sittings, in Trinity Term, before Justice Coleridge, and the Jury gave a verdict for the Company. The Plaintiff appealed. He contended he made no special contract, and when he delivered the goods without remark in effect said that he treated the notice as waste paper, and that must be taken as a dissent from the terms of it. Chief Justice Lord Campbell gave Judgment, and said—"There is abundant evidence of the special contract. A person who has notice of the limited authority of an agent must be bound by such limited authority and be supposed to have acted upon it. What sender says to a person who has no authority to alter the terms of the notice in any way is immaterial. It is contended that since the passing of the Carriers' Act (Railway and Canal Act) by giving notice, as in this case, there can be no special contract effected. But I think the Act has no such intention or operation. (His Lordship read the 4th section.) A carrier may still enter into a special contract. I think there is evidence to show the goods were received under a special contract, because it appears, and the Jury have found, that notice limiting the liability of the Company was

delivered, and afterwards Plaintiff delivered the goods to be carried. I think that was evidence from which the Jury were at liberty to infer a special contract contrary to the common law liability of the Company, and that the case was correctly left to the Jury. All that was said to the station-master was the same as if it had been said to a stranger, and amounted to nothing" (the Company's servants being unable to alter contract, and notice of such being given Plaintiff). Justices Wightman and Coleridge concurred. Verdict for Company.—*Tried in the Court of Queen's Bench, November* 5, 1853.—*From Law Journal Reports, vol.* 23, *page* 73, *Q. B.* (Subsequent decisions have laid it down that there must be a signed contract between the two parties, but this case is interesting as to limiting the power of the Company's servants to alter the contract.)

146. *Dunham* v. *London and North Western Railway Company.*—Action for £50 for delay to three crates of beef, Liverpool to London, on December 19, 1855. The case was first tried in the Liverpool County Court, when the Judge found a verdict for the Plaintiff, £25 for injury occasioned to the meat by the neglect and default of the Company. Plaintiff signed the following risk note, a counterpart of which was given him:—

"*London and North Western Railway, Park Lane Station, December* 19, 1855.—Hay and straw, furniture, glass, marble, china, castings, and other brittle and hazardous articles, &c., conveyed at the risk of the owners.—Delivered to the London and North Western Railway Company, from R. C. Dunham, three crates beef. For R. Duckworth, Newgate Market. To be forwarded from Liverpool to London at owner's risk.—R. C. DUNHAM."

The Judge found these conditions to be unjust and unreasonable. This case was tried conjointly with that of *Simon* v. *Great Western Railway*, and Chief Justice Jervis held that the same construction of the law would apply. The case was referred back to the County Court Judge for the circumstances under which the contract was entered into. As no further report is to be found of the case, it may be supposed that some compromise was agreed upon between the parties.—*Tried in Court of Common Pleas, June* 18 *and November* 4, 1856.—*From Law Journal Reports, vol.* 26, *page* 31.

147. *White* v. *Great Western Railway Company.*—Action

for damages, owing to a quantity of cheese arriving at destination too late for market—Bath to Basingstoke. The Plaintiff delivered the cheese on November 12, 1855, but it did not reach Basingstoke on the 15th November, the day of the market, when Plaintiff attended there to sell it. The Plaintiff, on delivery of the cheese, received a stamped receipt, on which were the words "Owner's risk," and on the back of the docket various conditions, No. 9 being as follows:—

"The Company will not, under any circumstances, be liable for loss of market or other claim arising from delay or detention of any train, whether at starting, or at any of the stations, or in the course of the journey."

The Plaintiff signed a paper containing this with the other conditions. The case was first tried before Serjeant Channell, Somersetshire Summer Assizes, 1856. The Judge decided that the condition was reasonable, and that Plaintiff had failed to prove a delivery to the Company as common carriers (the special contract taking it out of the common law liability), and he therefore directed a non-suit. Plaintiff appealed, on the ground that the case ought to have been left to the Jury. On the appeal case Justice Cresswell gave Judgment—"The Court are of opinion the Judge in the lower Court was correct. It appeared in evidence the Company did not receive any goods to be carried by them unless the sender signed a paper containing various conditions subject to which they were to be carried. It was contended that the conditions were unreasonable, and therefore void by operation of the Statute 17 & 18 Vic., cap. 31, sec. 7, and that the contract must be treated as unconditional. The learned Judge thought that the conditions were reasonable, that the contract was special, and that the Defendants did not receive the goods to be carried by them as common carriers. The case of *Latham* v. *Rutley* (2 B. & C., 20) appears to be directly in point; also *Walker* v. *York and North Midland* (23 Law Journal, 73, Q. B.)" Verdict for Company.—*Tried in Court of Common Pleas, February* 26, 1857.—*From Law Journal, vol.* 26, *page* 158.

148. *Beal* v. *South Devon Railway Company.*—Action for £70 for late delivery of several consignments sprats, Tor to Paddington. Plaintiff claimed that the sprats should have

been delivered at 6 a.m., whereas they were not delivered until 10 a.m. The usual risk note was signed by Plaintiff (sender), which the Company contended exonerated them from liability. The Plaintiff contended that the conditions signed by him in the risk note were not just and reasonable. The learned Judge being of that opinion, a verdict was entered for Plaintiff, leave being given to appeal.—*Tried before Baron Martin, Devon Spring Assizes.* The Company appealed, and, after statements on both sides, Chief Baron Pollock gave the following Judgment: —"It appears to me the case of *M'Manus* v. *Lancashire and Yorkshire Railway* (2 H. & N., 693) does not decide the present case. I think the 17 & 18 Vic., cap. 31, was not intended to apply to a written contract signed by the party who sends the goods. A contract to which a person has signed his name *quoad hinc* is a reasonable contract. He has agreed to it, and has no right to complain of it. It seems to me that the words of the statute apply only to those conditions which a Railway Company may impose on the public, and not to a special contract which an individual may enter into with them. The difficulty of proof of negligence cannot make the contract reasonable or unreasonable. If a contract imposed a condition with which it was impossible to comply I should say that the contract was unreasonable. The Company were not bound to carry fish, at all events they were not bound to carry it by a rapid train; and they had a right to say—'The rapidity of this train is for the benefit of passengers, and if we find we cannot carry by it both passengers and fish we will leave the fish.' I think the verdict should be for the Company."

Baron Bramwell concurred, and considered the Court bound by the decision in *M'Manus* v. *Lancashire and Yorkshire.* "The Plaintiff in effect says—'You have carried my goods on certain terms, but now it is convenient to me to say that I will not be bound by those terms, and you shall carry my goods on other terms.' Hence a special contract made by a railway company may be revised by the somewhat incompetent tribunal appointed for the purpose, because to the mind of the Judge who tries the case it is not just and reasonable." The learned Judge dissented from this. "Reasonableness is not a question of law, but a mixed question of law and fact, depending upon

the particular circumstances of each case. Suppose the Company said—'It is not worth while to carry fish, but if we do we will charge to the utmost extent, as if insurers.' Plaintiff may reply—'I am content that you should not be insurers if you will make a less charge.' Surely that would determine the question whether the contract was reasonable or not. There is extreme difficulty in applying the statute. I do not know what test to apply. Reasonableness is a relative term. A contract may be reasonable with reference to certain circumstances, but not as to others. It seems to me that the Company's stipulation is most reasonable, that the Company should not be liable for loss of market. The Company might well say, with respect to fish—'We would rather not carry it at all, but if we do it must be upon the terms, either that a large sum is paid for carriage, or that we shall not be liable for loss not occasioned by gross negligence or fraud.' The Company are either bound to carry it or they are not bound. If they are bound, let the Plaintiff tender his fish and a reasonable sum for its carriage, and if the Company refuse to carry it they are liable for an action. I think the verdict should be for the Company." Baron Channell concurred. Baron Martin dissented.—*Tried in Court of Exchequer, May* 30 *and* 31, *June* 6 *and* 8, 1860. *Hurlstone and Norton's Reports, vol. 5; also Law Journal Reports, vol.* 29, *page* 441 *(Ex.)*

149. *Lord* v. *Midland Railway.*—Action for damages from late delivery of dead meat, Settle to London. There were various consignments during August, September, and October, 1865. Plaintiffs, in June, 1864, applied to have meat conveyed by 9.12 a.m. train from Settle, arriving in London 12.15 the following morning (midnight). This was consented to. In the particular cases the train was three and a half and nine and a half hours late, and the meat did not reach Newgate Market until 6.5 a.m. and 11.10 a.m. The Company put in the consignment notes signed by Plaintiffs, on which was the notice—

"Fruit, fish, meat, poultry, game, and any other perishable articles not taken away, or not paid for within six hours after arrival, if directed to be kept till called for or to the like effect, or not directed at all, or directed to a place not known by the Company's agents or servants, or refused by the person or at the place to whom or where directed, may be forthwith sold, without any notice

to the sender or consignee, for the benefit of all concerned, by auction or otherwise, and payment or tender of the net proceeds of any such sale, after deduction of freight charges and expenses, shall be accepted as equivalent to delivery; and the Company in the declaration mentioned, here delivered, will not be responsible for any damage to any such articles on the ground of loss of market, provided the same be delivered within a reasonable time after the arrival thereof at the station from whence the delivery was made."

The Plaintiffs contended (1) that the Company agreed to deliver the meat by a certain time in the morning; (2) that they agreed to deliver it within a reasonable time; and, in either case, that they failed so to deliver the meat, and that in consequence it was too late for the London market, and had to be sold for a much less price. The Judge directed a non-suit, ruling there was no special undertaking to deliver the meat at any given time, as the correspondence as to the meat going by a particular train, upon which Plaintiffs relied, could not be quoted to contradict the special contract in consignment notes. He held the conditions of the Company reasonable. This ruling, at Liverpool, August, 1866, was appealed against, and the case was heard in the Common Pleas, when Chief Justice Bovill said—"I think that though there was an expectation (from the correspondence) that the goods would arrive in time for the market, they do not show that the Company contracted that they should arrive by that particular train. The contract, then, depends upon the consignment note, and that expressly negatives any such contract as set forth by Plaintiffs. I am of opinion that the condition on the back of the consignment note is reasonable. Whether it be reasonable or not must depend upon the nature of the condition, and this is not a condition to exempt the Company from all liability, but to relieve them from a particular kind of loss, namely, the loss of market. It is quite competent, I think, for any railway company or common carrier to so stipulate, for the condition does not apply to all kinds of damage to the goods carried, but only to this particular kind of damage, and hence its reasonableness." Justices Willes, Keating, and Montague Smith concurred. Non-suit confirmed, and Judgment for Company.—*Tried in Court of Common Pleas, January* 23, 25, 1867.—*From Law Journal Reports, vol.* 36, *page* 170.

150. *Finlay* v. *North British Railway Company.*—Action for £37 10s. for several consignments of sprats, Edinburgh to London, missing sale at Billingsgate Market, and arriving in the afternoon instead of 5 a.m. The Plaintiff admitted signing the Company's special contract, whereby he obtained a rate one-fifth less than the ordinary rate by his undertaking to accept the risk. Plaintiff contended he made a special contract with one of the Company's checkers irrespective of the general agreement, and that the general agreement he had made was unjust, unreasonable, and illegal. The Company pleaded that the special agreement had been legally made, and fully protected them, and that their checker did not make a special contract, nor was he empowered so to do. Lord Ardmillan held that the special agreement was valid, and exonerated the Company from blame or liability. The Lord President concurred, and remarked that Plaintiff contended he was forced into the agreement, and had no alternative. The Company charged, at their risk, £4 13s. 4d. per ton, as against £3 15s. per ton at owner's risk, the cost of the sprats in Leith being 18s. per ton, with the £4 13s. 4d. per ton added, Plaintiff contended, would amount to more than the value of the fish in Billingsgate, and it was impossible for the trade to be carried on to London at the higher rate; hence practically he was forced into the agreement. If the alternative were between a reduced rate and a rate so high as to be prohibitory, the Lord President would consider that unjust, because it left no option to Plaintiff. He said—"I think Plaintiff failed to prove this, as sometimes the price in Billingsgate is as high as £12 per ton, and it generally varies from £6 to £10, making an average of £8 per ton." Lord Kinloch dissented, on the ground that the Plaintiff had proved a special contract with the Defenders' servants that the fish would be sent by certain trains. Verdict for Company.—*Tried in the Court of Session, Scotland, July*, 1870. (The form of risk note has been quoted in other N. B. Co.'s cases.)

151. *Simpson* v. *London and North Western Railway.*—Action for £30 for delay to cattle meal, cattle spice, and a tent, consigned to an agricultural show. Plaintiff had exhibited at the show at Bedford in July, 1874. The Company had an office

at the show yard at Bedford. Plaintiff on 17th July went there and obtained one of the Company's consignment dockets, and filled it up, consigning the goods as sundries to himself at Newcastle-on-Tyne, remarking on the note, "Must be at Newcastle Monday, certain," and explaining to the clerk the goods were wanted there at that time for a show. The goods did not reach Newcastle until after the show was over, the show being held on the 22nd, 23rd, and 24th July. Plaintiff claimed for loss of sale and expenses incurred at Newcastle. The case was first tried at the Surrey Spring Assizes before the Lord Chief Justice. The Company paid £10 into Court; the Judge fixed the compensation at £20, in addition to the £10 paid into Court, giving leave to appeal. The Company appealed. Chief Justice Cockburn said—"Where the intended use and application of the thing to be carried was expressly brought to the notice of the carrier, or could reasonably be inferred from the circumstances known to him, so that this special use or application might fairly be considered to be within the contemplation of both parties to the contract, the consignor is entitled, on a breach of this contract by the carrier, to recover the damages naturally resulting from his being unable so to use or apply the goods. I think the Company knew the use these things were to be put to." Justice Mellor said—"The contract was that the goods should be at Newcastle on a certain day. I think the clerk had full authority to make this contract, and that the surrounding circumstances were such as to give him full notice of the purpose for which the goods were to be used. The contract was broken, as admitted." (Chief Justice Cockburn said—"The Company might have refused to make such a contract.") Justice Field concurred. Judgment against Company.—*Tried in Court of Queen's Bench, January* 18, 1876.—*From Law Journal Reports, vol.* 45, *page* 182.

152. *Webb* v. *Great Western Railway Company.*—Action for delay of two days to a furniture van containing furniture, Salisbury to Buckingham. It was carried on a special contract, duly signed and admitted, and the question turned upon "wilful misconduct." At Oxford it was found the van was too high to go under the bridges between Oxford and Buckingham,

and consequently the van had to be taken off its wheels, and thus the two days' loss of time. Justice Mellish said—"I think, in order to show that there was 'wilful misconduct,' the Plaintiffs must show this—and I think if they could have shown it, it would have been very good evidence—I think they ought to have gone as far as this, which they certainly have not done—they ought to have shown that on a certain occasion the trucks were found to be too high for the London and North Western bridges, and that the station-master at Salisbury knew it. I do not think that it was enough to show that he was negligent in not previously ascertaining what was the height of these bridges, or that the van must be necessarily of such a height as to go through them. I do not think that this is found in the findings of the case." Justice Field concurred. Judgment for Company.—*Tried in Court of Queen's Bench, April* 18, 1877.—*From Weekly Reporter, vol.* 26, *page* 111.

153. *Goldsmith* v. *Great Eastern Railway Company.*—Action for £5 damages for delay, from 18th March to 1st April, to two bags clover seed, London to Bury St. Edmunds, owing to delivery to a wrong person. The case was first tried in the Bury County Court, when Judgment was given against the Company. The Company appealed, and the case was tried in the Court of Queen's Bench. The Company proved the seed was sent at owner's risk and at special contract, as follows:—

"In consideration of the Company accepting the above goods, to be forwarded as aforesaid at the lower rate mentioned above, it is agreed that the goods are to be forwarded solely at the risk of the sender, with the exception that the Company shall be responsible for any wilful act or wilful default of the Company or their servants, if proved, for fraud or theft by their servants, and for collision of trains conveying the goods within the Company's limits."

The loss arose from the seed being received too late for the spring sowing season. The County Court Judge held himself bound by the decision of *Hoare* v. *Great Western Railway Company* (37 Law Times Reports, N.S., 186), where Lord Coleridge and Justice Lindley held that the delivery of goods by the Company to a wrong person, when conveyed by them at owner's risk, amounted to wilful misconduct, because it was gross carelessness.

Justices Lindley and Matthew concurred in the decision of the County Court Judge, and ratified his Judgment. Judgment against Company.—*Tried in Court of Queen's Bench, March* 21, 1881.—*From Law Times Reports, vol.* 44, *page* 181.

CARRIER IS BOUND TO CARRY IN REASONABLE TIME AND IN USUAL COURSE.

	Case No.		Case No.
Raphael v. *Pickford* (1843) ...	... 154	*Wren* v. *Eastern Counties* (1859)	157
Isaacs v. *L. & N. W.* (1855)	... 155	*Great Northern* v. *Taylor* (1866)...	158
Blackmore v. *L. & Y.* (1858)...	... 156	*Sharp* v. *North Eastern* (1866) ...	159

DIGEST.

In *Raphael* v. *Pickford* (1843) a parcel of quill pens, owing to direction having been accidentally destroyed, was delayed from August 8 to September 4, London to Birmingham. Although the declaration in the action did not specify "within reasonable time," Chief Justice Tindal held the carrier liable.

In *Isaacs* v. *London and North Western* (1855) owing to delay to 600 pairs soldiers' boots, the sale, at 10s. per pair, was lost—Northampton to Richmond, Yorkshire. The time of transit was from March 17 to the afternoon of March 23. The goods were transhipped at Leicester, Derby, and Northallerton, not having been loaded through. The Judge left it to the Jury—(1) Was there anything unreasonable in the manner in which the Company carried on their business? (2) Were they bound to forward all goods direct without transfer? (3) Did they employ an insufficient number of men in the operation of transfer? Verdict for Company.

In *Blackmore* v. *L. & Y.* (1858) potatoes to the value of £75 had been spoilt by fermentation, owing to delay at Wigan from deficient sidings. Justice Mellish said—"I shall hold the Company are bound to carry with reasonable expedition, and if their course of business

is inconsistent with reasonable expedition it is no answer to the action." Verdict against Company.

In *Wren* v. *E. C.* (1859) the action was for £13 for four hours' delay to fish, Yarmouth to Hitchin. The Company, although carrying at goods rates, had established the "custom" of using a passenger train for part of the journey. In this case the fish were not sent on by the passenger train. The Company were held liable.

In *G. N.* v. *Taylor* (1866) the action arose from six hours' delay and loss of market on three hampers poultry, Boston to London. Between Hitchin and London a collision had occurred between a Midland Company's passenger train and coal train, and hence the delay, the Midland Company having an Act to use the line. On the appeal Chief Justice Erle held the Company not liable, and said—"The Company has no control over the Midland Company, and is not responsible for its acts, and can only use the best efforts, in the event of an accident, to assist in removing obstructions and forwarding the goods as soon as possible."

In *Sharp* v. *N. E.* (1866) fresh plums, Wetherby to Colne, were too late for the Colne Saturday market. At Leeds the plums had to be transferred from North Eastern Company to Midland Company. The plums were not booked through. On the appeal Chief Baron Pollock held there was negligence, that after the arrival of the North Eastern train at Leeds so early as 5.45 p.m. there was time to transfer the plums to the Midland station in time for the 8 p.m. train to Colne same night. Judgment against Company.

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154. *Raphael* v. *Pickford*.—Action for 40s. damages for delay to a parcel of quill pens, &c., delivered in London 8th August, 1842, for Birmingham, and not delivered to consignee there until 4th September, which was too late for the performance of sender's contract with consignee. The delay was caused by the direction having been accidentally destroyed.

It appeared that in the declaration of the action it was not specified that the breach was a failure to deliver *within a reasonable time*, and therefore it was contended the Jury's verdict for 40s. could not stand.

On appeal Chief Justice Tindal said—"We think that the breach in this declaration may be read, as in effect, stating that the Defendants did not within a reasonable time, or any time afterwards, deliver the goods to the Plaintiff, but that by the Defendants' negligence they became wholly lost to the Plaintiff. And if the breach had been so in form, it would have been sufficient for the Plaintiff to prove so much of the breach as would support his right of action; and as the onus of proving the delivery would rest upon the Defendants, unless they proved a delivery within a reasonable time, the Plaintiff's right of action, and, consequently, the breach alleged, would be established. We are, therefore, of opinion the Plaintiff is entitled to retain his verdict for 40s. Judgment against carrier.—*Tried in Court of Common Pleas, February* 8, 1843.—*From Manning and Granger's Reports, vol.* 5, *page* 551.

155. *Isaacs* v. *London and North Western Railway.*—Claim for delay to 600 pairs soldiers' boots, whereby the sale, at 10s. per pair, was lost—Northampton to Richmond, Yorkshire. The boots, packed in hampers, were delivered on March 17 for the York Rifles, a militia regiment. The boots were not delivered until afternoon, 23rd March. Early on that day the Colonel wrote senders that, from the delay, the boots would not then be required, as other boots had been served out to the men. The boots, however, on arrival, were taken into the regimental store, but a week afterwards were returned to Plaintiff. This happened just as the order was issued from the War Office disbanding the militia regiments. The interest in this case is that the Company won the case by proving the time was occupied in transhipping the boots at several stations, viz., Leicester, Derby, and Northallerton. There was a Sunday and a Fast-day, say two Sundays, between the 17th and 23rd March. The Judge put to the Jury—(1) Was there anything unreasonable in the manner in which the Company carried on their business? (2) Were they bound to forward all goods

direct without any transfer? (3) Did they employ an insufficient number of men in the operation of transfer? The Jury gave a verdict for Company.—*Tried before Mr. Justice Willes and a Special Jury, July* 12, 1855.—*From Times, July* 13, 1855.

156. *Blackmore* v. *Lancashire and Yorkshire Railway Company.*—Action for £75 for potatoes delayed and spoilt by the fermentation they had undergone, Freshfield to Wildenhall (query Willenhall). The potatoes left on a Friday, but owing to obstructions of trucks at Wigan, from deficient sidings, did not arrive until Friday morning, when the damage was discovered.

Justice Mellish said—"I do not rule that the ordinary course of business is to be excluded. I shall hold the Company are bound to carry with reasonable expedition, and if their course of business is inconsistent with reasonable expedition it is no answer to the action." Verdict against Company for £75 damages.—*Tried at Liverpool Spring Assizes,* 1858.—*From Foster and Finlason's Reports, vol.* 1, *page* 76.

157. *Wren* v. *Eastern Counties Railway Company.*—Action for £13 for a quantity of fish, Yarmouth to Hitchin, delivered at 11 a.m., after the market, instead of at 8 a.m., according to usual custom. The sender, on delivery, signed a "Fish consignment note" at goods rate. The note specified that the Company only undertook to forward the fish within a reasonable time, and did not state whether they were to be carried by a goods train or a passenger train. The usual course was, the fish were carried to Cambridge by a direct fish train, and next morning sent on from Cambridge by a passenger train reaching Hitchin at 8 a.m. From some unexplained cause the fish in this instance were delayed. Consignee refused it on arrival, and the Company sold it and tendered the proceeds, which Plaintiff likewise refused. The Company contended (1) there was no contract proved whereby they were bound to send the fish on from Cambridge by passenger train; (2) that there was no unreasonable delay. At the first trial, at the Surrey Assizes, before Justice Blackburn, the Jury found for the Plaintiff damages, agreed at £13. The Company appealed, and on the appeal case Chief Justice Cockburn said—"The true

view of the case is, the Company contracted to convey the fish according to the ordinary course of carriage of goods of this character. The Company, by a long course of dealing, as far as this species of traffic between Cambridge and Hitchin was concerned, had been accustomed to convey fish from Cambridge to Hitchin by a passenger train arriving at Hitchin at 8 a.m., in time for the market. Plaintiff knows that in the ordinary course of conveyance the fish arrives at Hitchin in time for the market, and, knowing this, he contracts to have the fish forwarded accordingly. And in reason and justice he is entitled to be dealt with by the Company on that footing. I think there is nothing in the written contract to alter that state of things. The reasonableness of the time of the conveyance is to be ascertained by reference to the ordinary course of conveyance to Hitchin. The fish in this case did not arrive at Hitchin in the usual and fixed time through some oversight of the Company's servants at Cambridge, which they cannot justify, and they therefore say that they were only bound to forward the fish by a goods train, and that they did so. But that train did not arrive until 11 a.m., which was too late for the market. I think the Plaintiff is entitled to recover." Justice Wightman, Justice Hill, and Justice Blackburn concurred. Judgment against Company.—*Tried in Court of Queen's Bench, November* 2, 1859.—*From Law Times Reports, vol.* 1, *page* 5.

(This was a very hard decision against the Company for three hours' delay. The question of "reasonable" time does not appear to have been considered. It should be a warning to Companies not to give greater facilities than is embraced in the contract, because by doing so a "usual custom" may be created which overrules the letter of the contract.)

158. *Great Northern Railway Company* v. *Taylor.*—Action for £23 11s. 9d., arising from six hours' delay and loss of market on three hampers poultry, Boston to London. The hampers were delivered at Boston on August 30, and duly forwarded, but between Hitchin and London a collision occurred between a Midland Company's passenger train and coal train, which gave rise to the delay. Plaintiff contended that by the 8 Vic., cap. 20, sec. 87, the Company entered into an

agreement with the Midland Company, allowing them to use the line between Hitchin and London, and that, consequently, the Company were responsible for the negligence of the Midland Company, which gave rise to the collision; also, that there was a breach of contract to carry and deliver within a reasonable time; furthermore, that the Company, by their Act 13 & 14 Vic., cap. 61, were authorised to charge, and did charge, a higher rate for perishable goods. The Company contended that there was no contract to deliver in time for the market, and that the delay, caused as it was solely by the negligence of the Midland Company, was not unreasonable. The Company admitted £18 15s. 3d. [The report does not state why; probably the poultry was refused, and sold for this sum.] The real contention was for the difference, £4 16s. 6d. The case was first tried before the County Court, and this was an appeal stated by the Judge of the County Court. The Judge held there was no implied contract to deliver in time for the early market, but he held that the Company were responsible for the negligence of the Midland Company which caused the delay. "If the Court of Common Pleas shall be of opinion that there was an implied contract to deliver in time for the early market, or that the Company were responsible for the delay arising under the circumstances above stated, the verdict of the County Court for the full amount is to stand. If it be held there was no such contract, and the Company were not responsible for such delay, the verdict to be reduced to £18 15s."

Chief Justice Erle said — "I am of opinion our Judgment should be for the Company. I am of opinion that the duty of a common carrier is to carry goods safely, and no doubt he is to deliver them within a reasonable time; but he has nothing to do with delivering at any particular time, unless there be a special contract to that effect. The Company has no control over the Midland Company, and is not responsible for its acts, and can only use the best efforts, in the event of an accident, to assist in removing obstructions and forwarding the goods on as soon as possible. I think, therefore, the Company are not liable." Justice Byles concurred, and quoted Chief Justice Tindal, in his written Judgment in the case of *Raphael* v. *Pickford* (5 M. & G., 558), where the Chief Justice

says—"The duty to deliver within a reasonable time is merely a term engrafted by legal implication upon a promise or duty to deliver generally." "The carrier, therefore, I think, is bound to deliver within reasonable time." Justice Montague Smith concurred, and said—"In the case of *Davis* v. *Garrett* (6 Bing., 716) the words used were 'unnecessarily deviating from the usual and customary course.'" Justice Keating concurred. Judgment for Company.—*Tried in Court of Common Pleas, April* 24, 1866.—*From Law Times Reports, vol.* 14, *page* 363; *also Law Reports* (*Common Pleas*), *vol.* 1, *page* 385.

159. *Sharp* v. *North Eastern Railway Company.*—Action for the value of a number of hampers plums (56 pecks) delivered too late for market, Wetherby to Colne. The hampers were delivered on Thursday, August 31, and Plaintiff was told that that day's train had left, and the hampers could not be forwarded until the next day, Friday. The Plaintiff and his man swore the station-master undertook the plums should be in Colne in time for Saturday's market. The station-master and his porter denied any such promise or undertaking, and the station-master said he was unacquainted with the mode of carriage beyond Leeds, as his Company's line (North Eastern) ended at Leeds. The contract appears *not* to have been through to Colne. The station-master indorsed the way-bill, "Forward immediately—Wanted for market on Saturday morning." While the station-master may have done this with zeal to do his best for the trader, when a case of this kind comes into Court, it affords a plausible argument in support of Plaintiff's story. It appeared the plums arrived in Leeds at the North Eastern Company's station at 5.45 p.m. Friday, and had they been carted across to the Midland Company's Leeds station before 8 p.m. they would have reached Colne in time for the Saturday's morning market. The Company contended that they closed their Leeds station at 6 p.m., and their servants left work, and there was not time between 5.45 p.m. and 6 p.m. to unload and deliver the plums to the Midland Company; that they had made a special contract with Plaintiff when he signed the following consignment note, and that the plums had been sent in the ordinary course of business; that there

was no contract to deliver at Colne absolutely, but to deliver only subject to the conditions on the back of the note; that they were not bound to keep their offices open and their servants at work beyond the usual and customary time any more than bankers or merchants were to keep their banks and offices open after closing time had arrived.

"*North Eastern Railway.*—Deliver as under, *subject to the conditions* on the other side."

The first condition was—"The Company are carriers only to places in the immediate vicinity of their goods stations, and goods addressed to other destinations are received only to be carried to the nearest or most convenient goods station on the Company's railway, and there delivered to or towards their destination by railway or other public carriers, or otherwise as opportunity may offer, or they will, at the discretion of the Company, be suffered to remain on the Company's premises, to be placed in shed or warehouse, if there be convenience for receiving the same, pending communication with the consignee; and the delivery to such railway or other carrier, or advice given or sent to the consignee of the goods remaining in the Company's premises, or that they are placed in the shed or warehouse, will be deemed a delivery of the goods so as to relieve the Company of all responsibility in respect thereof."

The case was first tried before Justice Keating, at Leeds, at the Yorkshire Spring Assizes, and it was left to the Jury to say what the contract was. The Jury found for the Plaintiff—£13 9s. for cost of fruit, loss of profit in the market, expenses and loss of time consequent on the non-delivery. The Company appealed, and on the appeal case, before Chief Baron Pollock and Barons Martin, Bramwell, and Pigott, the Court were of opinion the Company were negligent in not sending the fruit to the Midland station the same evening. They ought to keep their men at the station long enough after the arrival of the train at so early an hour as 5.45 p.m. to enable them to discharge the train of its contents, and to send on the same evening such goods as might be booked to go on by the Midland line; and it was not a reasonable course of business in them, or such as Plaintiff could reasonably have expected them to pursue, to keep at their station until the following morning goods marked on the way-bill to be "forwarded immediately." Judgment against Company.—*Tried in Court of Exchequer, April* 18, 1866.—*From Law Times Reports, vol.* 14, *page* 487.

DELAY RESULTING FROM THE CARRIER REFUSING TO DELIVER AND DEMANDING CHARGES THAT HAD BEEN ALREADY PAID AT SENDING STATION.

	Case No.		Case No.
Davis v. *L. & N. W.* (1858)... ...	160	*Gordon* v. *G. W.* (1881)	697

160. *Davis* v. *London and North Western Railway Company.*—Action for refusal to deliver goods, and their detention from February to July. The goods consisted of pictures of the Sepoy rebellion and anatomical models in wax, sent from Birmingham to Sheffield. The carriage was prepaid at Birmingham, but by some error was also demanded in Sheffield, viz., £1 3s. 6d. Consignee refused to pay, and left the goods on the Company's hands. Ultimately the goods were obtained by consignee on a Judge's order. At the end of July the Company offered to deliver the goods, and abandoned their demand. The case was first tried at the Warwick Summer Assizes, 1858, when the Jury gave a verdict at the rate of £4 per week for loss of profit during the detention. The Company had paid £15 into Court.

On the appeal Chief Baron Pollock said—"We are, I believe, all of opinion that though it cannot be said that the £1 3s. is the measure of damages—as he could have got the goods for £1 3s., which he did not choose to pay—the real damage is nothing more than that. We are certainly not of that opinion; yet we think that, with reference to the nature of the entire case and the amount of the actual damage, the sum of £15 paid into Court was really sufficient, and that there is no ground for disturbing the verdict or altering it, or entering the verdict for the Plaintiff for any other damages than those paid into Court. In the course of the discussion much was said about the principle upon which such a case should be disposed of. I think it is so impossible to say that a person who could avoid an injury of which he complains is at all times entitled to act in an obstinate, wilful, and perverse manner, and say, 'I care nothing about the loss that is occasioned by this; I shall have a claim against the other party, and I will let it go on.' On the other hand, the persons who do the injury are no doubt

responsible for all the actual and legitimate consequences of the injury or violation of the right, or of acting on a right that does not belong to them, which resolves itself into the same result. They are responsible for the damage, but not for all the damage where part of it might have been avoided; and we think that the Jury are entitled to look at the conduct of the parties, and to see where the real blame lies, and to whom in reality the mischief is to be attributed. There can be no doubt a person is not bound, if he is called upon to pay a sum of money for goods when the claimant is not entitled to make the charge, to pay the money on all occasions, and then try the question by claiming to have the money back again. That cannot be laid down. But we think that in a case like the present the Jury are entitled to look at all the circumstances, and to see where the blame attaches and to whose conduct the loss is due, and to say in what manner the actual mischief shall be borne, according to the way in which the parties have conducted themselves. In this case, by consent of the parties, that duty is thrown upon us—a duty which we discharge with some reluctance. Upon the whole, certainly expressing as strongly as possible that the £1 3s. is not the measure of the damages, we think at the same time that the £15 paid into Court is sufficient."—*Tried in Court of Exchequer, November* 23, 1858.—*From Weekly Reporter, vol.* 7, *page* 105.

REASONABLE TIME A QUESTION OF FACT FOR THE JURY.

	Case No.
Hales v. *L. & N. W.* (1863)	142

DIGEST.

In *Hales* v. *London and North Western* (1863) Chief Justice Cockburn said—"Where no time is mentioned for delivery of goods carried, the obligation of the carrier is to deliver them within a reasonable time, and that is a question of fact" (for Jury).

Delay where the Carrier had Undertaken to Convey within a Particular Time, or in Time for a Particular Event.

(*See under "Special Contracts"—"Acceptance of Contract."*)

Delay to Travellers' Patterns.

	Case No.		Case No.
G. W. v. *Redmayne* (1836)	143	*Candy* v. *Mid.* (1878)	161
Woodger v. *G. W.* (1867)	144		

DIGEST.

In *Candy* v. *Midland* (1878) Plaintiff claimed 21s. for one day's delay to traveller's samples, London to Chesterfield by goods train. It was attempted to fix a special time delivery from the fact that the box was addressed "Traveller's goods." On the appeal case Baron Cleasby held that it was an ordinary goods contract, and that there was no "special notice" given to the carrier. Judgment for Company. (See also *Woodger* v. *Great Western* and *Great Western* v. *Redmayne*, under "Recovery of Damages," &c.)

161. *Candy* v. *Midland Railway Company.*—Action for £1 1s., a commercial traveller's expenses for one day lost time, owing to delay to his box of samples, London to Chesterfield. The box of samples was delivered at the Cannon Street booking-office on the 6th June, with printed address, "Traveller's goods—Deliver immediately—Carriage paid," with the address of consignee. Plaintiff maintained the box should have been delivered at Chesterfield by the goods train on June 7, whereas it was not delivered until the evening of the 8th June. The case was first tried in the London City Court, when the Judge non-suited Plaintiff, as no directions were given as to the mode of conveyance, and the goods were sent by the goods train at the ordinary rate. Plaintiff appealed, and on the appeal case Baron Cleasby said—"It is a question

of damage for breach of contract. Now, the amount of damages for breach of contract is very frequently a question of great difficulty. I do not think the point (of law) can be better put than it was in the case of *Simpson* v. *London and North Western Railway*, (33 Law Times, 805), which has been referred to. Chief Justice Cockburn there said that 'whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object.' In this case he might consider that it was a question of notice (as to the urgency of the transit). That is entirely a question of fact. The conclusion at which I arrive is certainly that there was no special contract in the case whatever. The goods were delivered in the ordinary way at one of the Company's receiving-houses; they were not booked to go by any particular or special train, or to have any particular or special rate of carriage paid for them. It was an ordinary goods train contract. The mere fact of the box being taken in at the receiving-office where the Company ordinarily receive goods with this label on them, which has been so much relied on by the Plaintiffs, is not a sufficient notice brought to the knowledge of the Company so as to make the purpose for which the goods were being sent common knowledge to both parties. Plaintiffs' intention was to bring it to the knowledge of the Company, but their intention was imperfectly carried into execution. With the vast quantity of goods that the Company are daily and hourly receiving for conveyance to all parts of the kingdom, I cannot help feeling myself that it would be straining matters far too much if we were to hold that putting the words 'Traveller's goods' on the address label, without specially calling the carrier's attention to the nature of the contents of the box at the time, in any way affected them with what is called 'special notice' of the fact, so as to make particular damages recoverable." Justice Hawkins concurred. Judgment for Company.—*Tried in the Exchequer Division, Jany.* 22, 1878.—*Law Times Reports, vol.* 38, *page* 226.

Delay to Goods Traffic owing to a Preference being Given to Waggons containing Live Stock.

Case No.
Wallace v. *G. S. & W.* (1869) 162

DIGEST.

In *Wallace* v. *Great Southern and Western* (1869) agricultural machinery for a show was too late, owing to the railway waggons being shunted off a train at Ballyhale Station to take on waggons of cattle. Chief Justice Whiteside, on the appeal case, said—"The verdict must be set aside. The principle brought before us (of shunting off the waggons) is one that should not receive our approval, and I cannot lay it down as law that the Plaintiff is to be a loser by such a change as was made at Ballyhale. If the Company give a preference to the conveyance of live stock, and thereby delay the delivery of other goods, that is an arrangement which I shall not sanction."

162. *Wallace* v. *Great Southern and Western Railway Company.*—Action for damages for delay to agricultural machinery too late for a show. Machinery delivered in Dublin 10th September for Waterford Show on 12th September. It appeared that on arrival of the waggon containing the machinery at Ballyhale Station it was shunted off the train with three others to take on four waggons of live stock, and hence the delay. The case was first tried beford Judge Fitzgerald and a Jury, when a verdict was given for the Company. Claimants appealed to the Queen's Bench, when Chief Justice Whiteside said—"I am of opinion that this verdict ought to be set aside as being against evidence. The principle brought before us (of shunting off the waggons) is one that should not receive our approval, and I cannot lay it down as law that the Plaintiff, who merely gave his goods to the Company to carry, is to be a loser by such a change as was made at Ballyhale by the servants of the Company. If they give a preference to the conveyance of live stock, and thereby delay the delivery of other goods, that is an arrange-

ment which I shall not sanction. Carriers are bound to deliver within reasonable time the things entrusted to them, and this binds them to do no act of themselves which will prevent them from using due diligence in delivering the goods. Overwhelming necessity will alone excuse them, and of such overwhelming necessity no evidence was produced." Judge George concurred, and said—"The machinery would, in the ordinary course of traffic, have reached Waterford on the 11th September, in time for the show of the 12th September." Order for new trial. Judgment against Company.—*Tried in Court of Queen's Bench (Ireland), January* 29 *and February* 1, 1869.—*From Weekly Reporter, vol.* 17, *page* 464.

DELAY AND DAMAGE RESULTING FROM ACT OF GOD (STATE OF THE WEATHER) OR UNAVOIDABLE ACCIDENT.

	Case No.		Case No.
Forward v. *Pittard* (1785) ...	187	*Northampton Gas* v. *L. & N. W.* (1868)	770
Siordet v. *Hall* (1828)	193	*Gallagher* v. *G. W.* (1874) ...	163
Briddon v. *G. N.* (1858)	678	*Liver Alkali Co.* v. *Johnson* (1874)	92
G. N. v. *Taylor* (1866)	158		

DIGEST.

In *Forward* v. *Pittard* (1785) twelve pockets of hops had been accepted at Weyhill, where an annual fair is held, to carry to Shaftesbury by road. The hops were stored by carrier in a booth; the booth took fire from a neighbouring booth, and the hops were burnt. Lord Mansfield held that the contract of carriage had commenced, that the carrier was an insurer, that the fire was not by lightning or the act of God, and that the carrier was responsible.

In *Siordet* v. *Hall* (1828) a cargo in a steam vessel was damaged by water, through the pipe of steam boiler bursting in consequence of having been cracked by frost. Held—That this was not an act of God, but negligence in the filling of the boiler with water before the time for heating it, although it was the practice to fill overnight when the vessel started in the morning. Judgment against the carrier.

In *Briddon* v. *Great Northern* (1858) two waggons cattle were delayed thirty hours without food. The detention arose from a heavy snowstorm, and the engine was taken off the goods train to help a passenger train. Chief Baron Pollock confirmed the Judgment for the Company, saying—"The contract entered into was to carry the cattle without delay and in a reasonable time under *ordinary circumstances*. If a snowstorm occurs which makes it impossible to carry the cattle except by extraordinary efforts, involving additional expense, the Company are not bound to use such means and to incur such expense."

In *Great Northern* v. *Taylor* (1866) the action arose from six hours' delay and loss of market on three hampers poultry, Boston to London. Between Hitchin and London a collision had occurred between a Midland Company's passenger train and coal train, the Midland Company having an Act to use the line, and hence the delay. On the appeal case Chief Justice Erle held the Company not liable, and said—"The Company has no control over the Midland Company, and is not responsible for its acts, and can only use the best efforts, in the event of an accident, to assist in removing obstructions and forwarding the goods as soon as possible."

In *Northampton Gas* v. *London and North Western* (1868) the Judge said he did not think the snapping of an axle during frost can be considered as an "act of God" in a legal sense.

In *Gallagher* v. *Great Western* (1874) fish was delayed between Waterford and London by a fog at sea, but there was also delay in London, so that the case did not turn on the question of the fog.

In *Liver Alkali Company* v. *Johnson* (1874) a barge loaded with salt cake got upon a shoal in the river Mersey in consequence of a fog, and the salt cake was damaged. This was held to be a peril of navigation, and in no sense to be called the act of God or of the Queen's enemies.

163. *Gallagher* v. *Great Western Railway Company.*—Action for delay to fish, Waterford to London. The principal delay was occasioned by a fog at sea, yet there was also delay in London by which the fish was injured. Plaintiff complained of non-delivery for a special market, and non-delivery within reasonable time. The Company contended the fish was carried under a special contract, and that the Company had two rates—6s. per cwt. at Company's risk, and 5s. per cwt. at owner's risk—sender having an option of selection. The first trial was at the Waterford Spring Assizes, before Baron Dowse, when the Judge directed the Jury that the conditions were unreasonable, and the verdict was against the Company.

On appeal Chief Baron Palles said—"The question in this case is—is 6s. the fair and reasonable amount which the higher rate ought to be, having regard to 5s. being the rate of carriage at owner's risk? If this higher rate were prohibitive or excessive, the elements upon which my opinion proceeds would be absent, for then there would not have been the alternative of carriage upon the ordinary terms of the carrier's liability at a reasonable rate. Here, however, there is no contention that the higher rate is excessive; if there were, it would have been for the Plaintiff to have required the question to be left to the Jury; and it must now be taken that it was admitted that the usual proved rates—(1) for carriage at owner's risk, (2) under the carrier's ordinary liability—were, *inter se*, reasonable. Upon this assumption I am of opinion that the terms are such that, although they would have been unjust and unreasonable if forced upon the public without affording them the alternative of forwarding their goods upon the terms of liability ordinarily incident to a carrier, they were, under the circumstances of this case, and having regard to the alternative offered by the Company, just and reasonable." Barons Fitzgerald and Deasy concurred. Baron Dowse concurred, and said—"In the case of *Harrison* v. *London Brighton and South Coast*, in the Exchequer Chamber, it was decided that it lies on the party objecting to the alternative as unreasonable to show that it is so." Judgment for Company.—*Tried in Court of Exchequer (Ireland), June* 3, 4, 5, 10, 1874.—*From Irish Reports, vol.* 8, *page* 326.

DAMAGE AND LOSS OF GOODS.

DAMAGE AND LOSS WHERE A SPECIAL CONTRACT IS IN QUESTION.

(See also "Special Contracts.")

	Case No.		Case No.
Kerr v. *Willan* (1817)	164	*Maljee Sewjee* v. *G. I. P.* (1866)...	169
Simon v. *G. W.* (1856)	165	*Genister* v. *G. W.* (1873)	170
Malcolmson v. *G. S. & W.* (1860)	166	*D'Arc* v. *L. & N. W.* (1874) ...	171
Lewis v. *G. W.* (1860)	167	*Lewis* v. *G. W.* (1877)	172
Peek v. *N. S.* (1863)	168	*Haynes* v. *G. W.* (1879)	173

DIGEST.

In *Kerr* v. *Willan* (1817) the action was for a truss lost, London to Dumfries, value £40 15s. 6d. The carrier could not bring his notice (limiting his liability under certain circumstances) home to the sender, and had to pay for the truss. (*See* "*Special Contracts.*")

In *Simon* v. *Great Western* (1856) the action was for part loss and part damage to furniture, Paddington to Taunton, carried under special contract. The Court was of opinion the Judgment should be generally for the Company. (*See* "*Special Contracts.*")

In *Malcolmson* v. *G. S. & W.* (1860) a papier-maché chair, packed with straw matting, was broken in transit. Sender's porter had signed a note with "Owner's risk" written on it, but this was held not to amount to a special contract sufficient to relieve the Company from responsibility. (*See* "*Special Contracts.*")

In *Lewis* v. *Great Western* (1860) a bag of clothes, Shiffnal to Wrexham, was lost, and a bag of flour bags alleged to have been substituted. The Company were held not liable, as consignee did not discover the matter or report it until twelve days after delivery. (*See* "*Special Contracts.*")

In *Peek* v. *North Staffordshire* (1863) three cases of marble, Stoke to London, were damaged from wet and

rust from the nails of the packages, which, with the water, had soaked through the cases and discoloured the marble. The Company were held liable. (*See* "*Special Contracts.*")

In *Maljee Sewjee* v. *Great Indian Peninsular* (1866) cotton was burnt in transit. The Company's notices as to non-liability for fire were brought home to sender, and the Company were held not liable. (*See* "*Special Contracts.*")

In *Genister* v. *Great Western* (1873) eleven dozen chairs were damaged by the waggon going off the line, owing to the engine running into cattle on the line—High Wycombe to London. The sender could not prove wilful misconduct on Company's part, and hence the Company were held not liable. (*See* "*Special Contracts.*")

In *D'Arc* v. *London and North Western* (1874) a wax-work figure, owing to delay, mis-sending, and wet, was damaged. Although carried at owner's risk, sender's remark across his consignment note, "Forward packages at our own risk," was not held to be sufficient to relieve the Company of liability. (*See* "*Special Contracts.*")

In *Lewis* v. *G. W.* (1877) 156 cheeses were damaged seriously, London to Shrewsbury, through, as it was alleged, being loaded in a waggon on their rims in two tiers. The senders not being able to prove "wilful misconduct," the Company were held not liable. (*See* "*Special Contracts.*")

In *Haynes* v. *G. W.* (1879) two horse rakes were damaged in transit between Wenlock and Newark. The sender could not establish "wilful misconduct" on part of the carrier, and the Company was consequently held not liable. (*See* "*Special Contracts.*")

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164. *Kerr* v. *Willan.*—Action for £40 15s. 6d. for value of a truss lost, London to Dumfries. Plaintiff's porter delivered the truss to Defendant's office at the "Bull and Mouth" Inn. Defendant had a notice exhibited, painted on a board at his

office, that he would not be liable for more than at the rate of £20 *per cwt.* for any goods delivered to him whose weight exceeded 28 lbs. per package. The porter admitted when at the office frequently seeing the board, but he did not suppose there was anything upon it, and, although he could read, had never in fact read what was upon it until after the loss of the truss. Lord Ellenborough said—"By the common law the carrier is responsible for the loss of goods, unless he enter into a special contract by which he limits that responsibility. This he may do by giving notice in the public papers, or by any other medium by which the party with whom he deals is effectually apprised of the terms upon which he proposes to deal. If the person who carried the goods to the office in this case had read the notice, the Plaintiff would have been bound by it; but he did not read it, and consequently the Plaintiff was not bound by the limitations which it contained." Verdict for Plaintiff, £40 15s. 6d.—*Tried at Nisi Prius, March* 3, 1817.—*From Starkie's Reports, vol.* 2, *page* 53.

165. *Simon* v. *Great Western Railway Company.*—Action for part loss and part damage to furniture, Paddington to Taunton. The sender signed the following agreement, upon which the Company undertook to carry the furniture at a mileage rate:—

"To the Great Western Railway Company, Paddington Station, November 8, 1854.—Receive from John Simon, of _____, the undermentioned, on the conditions stated on the other side. To be sent to Taunton Station at the rate or charges below mentioned, which I agree or cause to be paid on delivery of such goods to the consignee or his order, in consideration of the nature and description of the same."

Among conditions were—

Part of Great Western published Condition 14.—"Goods conveyed at a special or mileage rate must be loaded and unloaded by the owners or their agents, and the Company will not be responsible for any risk of stowage, loss, or damage, however caused; nor for any discrepancy in the delivery, as to either quantity, number, or weight; nor for the condition of articles so carried; nor for detention or delay in the conveying or delivery of them, however caused."

Part of Great Western published Condition 4.—"Nor for loss, detention, or damage of any package insufficiently or improperly packed, marked, directed, or described, or containing a variety of articles liable by breaking to damage each other."

Judgment was given by Chief Justice Jervis, as follows:—"It seems to me in this case that it was the intention of the

Legislature, so far as I can gather from its very obscurely worded section, to place the whole railway system under the control of the Courts. The previous section gave large powers to the Court of Common Pleas; but then there are various questions which will arise which cannot be determined by that Court alone, some of which are with reference to what was then complained of, special contracts resulting from notices published, which prevented parties from recovering, when in truth they were bound by the monopoly of the company, and could carry in no other way; and it is intended to prevent that—by rather a rough mode of justice undoubtedly—in the section which is now under discussion. I think that the fair meaning of the section is this—that, in the first place, we will declare that all notices and conditions which heretofore were given, and by which the public were affected by knowledge or notice, shall be null and void in so far as they relieve the company from responsibility for the negligence of its officers; but we shall not prevent conditions being made between the company and the party—as a subsequent part of the clause shows—which shall appear to be just and reasonable by the presiding Judge of the Court before whom the question comes. And in order to make that binding and to avoid all discussion—'Although it be just and reasonable, it shall not be binding on the party unless it be signed by the party who is to be affected by the contract.' And therefore the section will run thus—'General notice to limit the liability shall be null and void; but the parties may make special contracts with the companies themselves, provided those contracts are adjudged by the Court or Judge to be just and reasonable; and whereas, on the one hand, you complain that the monopoly of the company compels the public willingly or unwillingly to carry by that particular conveyance, and are to be driven, as it were, into contracts, we will give them the security of the Courts to take care that the contracts which are made under that species of compulsion are just and reasonable.' I think that the condition based upon the mileage rate, in proportion to the risk incurred, is just and reasonable. I think the other condition is not just and reasonable, because it seeks to relieve the Company from a loss by reason of insufficient packing, it being quite immaterial

whether the goods are properly packed or not if the whole package is lost; and they rely on that as the ground of relief. The Court is of opinion the Judgment should be generally for the Company."—*Tried in the Court of Common Pleas, June* 18 *and November* 4, 1856.—*From Law Journal Reports, vol.* 26, *page* 25.

166. *Malcolmson* v. *Great Southern and Western Railway Company.*—Action for value of a papier-mache chair, packed with straw matting, and broken in transit from Dublin to Carlow. Company relied on a note upon which was written "Owner's risk," which note had been read over and explained to sender's porter, who affixed his mark thereto, duly witnessed. Company pleaded insufficient packing, and that such a fragile article should have had a framework round it.—*Tried before T. R. Henn, Esq., Carlow Quarter Sessions,* who gave a decree for sum claimed, on the ground that the risk note *did not amount to a special contract,* and even if it did such contract was void, the conditions being, in his opinion, unreasonable. (See sec. 7 of Railway Traffic Act, 17 & 18 Vic., cap. 31.) On appeal, tried before *Justice Keogh, Carlow Assizes,* 1860, his Lordship said he did not consider such a special contract as the Company relied on satisfactory, and that he could not under it hold the conditions of freedom from all risk to be reasonable. He intimated the Company might protect themselves in future by a regular form of contract declaring an express condition of non-liability for safe delivery unless goods were properly and securely packed, so as to guard them from friction or jolting and risk to fragile articles incident to the rail carriage, provided sender expressly contracts with Company; but the mere words "Owners' risk," to which sender's man affixed his mark, was not such a special contract to release the Company from all risk as his Lordship could approve of.

167. *Lewis* v. *Great Western Railway Company.*—Action for £5 7s. 6d., the value of a bag of clothes, Shiffnal to Wrexham. There were sixteen packages of furniture and two bags of clothes. It appeared one of these bags of clothes was somewhere lost, and a bag containing empty corn sacks substituted for it. Consignee did not examine and discover the circum-

stance until some twelve days after accepting delivery. When the goods were accepted at Shiffnal, Plaintiff, being both sender and consignee, admitted signing a printed consignment note on which was printed, in large type, "Conditions," and among the conditions was one as follows:—

"That no claim for deficiency, damage, or detention would be allowed unless made within three days after the delivery of the goods, nor for the loss unless made within seven days of the time they should have been delivered; and that the Company would not be answerable for the loss or detention of any goods which might be untruly or incorrectly declared or described in the declaration or receiving note furnished to the Company."

On the appeal case Chief Baron Pollock said—"The Judgment must be for the Company. It is clear that it cannot be assumed, either that there was no special contract, or that the conditions were unreasonable. I understand the Judge to have ruled, in effect, that if a person signs a contract and will not venture to deny that he was aware it was a contract, and that he saw the 'conditions,' and there is no evidence to detract from the apparent result, he is bound by it. It was not denied that the Plaintiff had an opportunity of reading the contract. I think there was a special contract, and that the Plaintiff is bound by it, and ought not to be allowed to say that he signed it but did not mean to be bound by it.

"As to the question whether the conditions are reasonable, I think the condition relied on in the fifth plea is perfectly reasonable. It was argued that their operation is to introduce into these contracts a sort of statute of limitations. There is no statute of limitations applicable to crimes, but there are many charges which, if not brought forward at once, no Judge would allow to be entertained. The Company, wishing to guard against any allegation of neglect in the delivery of goods confided to them, require that when the goods are delivered they shall be promptly examined, and a complaint at once made if there is occasion for it. Such a condition is perfectly reasonable. The law allows persons to make their own bargains in matters of this sort. As to the condition the breach of which is relied on in the sixth plea, the Company might be prejudiced if articles requiring great care were described as things not of that character. Wearing apparel, for instance, may be of greater value and more liable to injury than bundles

of old carpets. I think, therefore, that this condition was reasonable."

Baron Channell concurred, and said—"If there had been a doubt whether Plaintiff saw or understood the nature of the contract—as if the document had been presented to him at the close of the day when the light was failing, or if the word 'Conditions' had not been plainly legible; as, for instance, if the letters 'T.O.' (turn over) had occurred at the foot of the paper in small type, and the conditions were on the other side—it might have been proper to have submitted the circumstances to the Jury, who might have drawn an inference as to whether the Plaintiff was bound by his signature." Baron Bramwell, who first tried the case, concurred. Judgment for Company.—*Tried in Court of Exchequer, June 5,* 1860.—*From Hurlstone and Norman's Reports, vol. 5, page* 867.

168. *Peek* v. *North Staffordshire Railway Company.*—Action for £52 for damage to three cases of marble chimney pieces. The marble had received damage from wet, while rust from the nails of the packages had, with the water, soaked through the cases and discoloured the marble—Stoke to London. The chimney pieces were carted from Mr. Meigh's house at Shelton to Stoke Station in July, 1857. The carter asked what would be the insurance, and he was told that before that could be answered the value must be declared. The cases lay at the station until the 12th August, and senders seemed to fence the inquiry as to the value of the goods, and the Company would not quote the rate of insurance until the value was declared. On the 1st of August senders wrote—"Please forward the three cases of marble, not insured, to W. Peek, Esq.; to be called for at Camden Town Station, London." Correspondence had taken place between senders and the Company, but this order to forward did not mention or refer to such correspondence, or make such correspondence part of the contract. Before the order was given, a Mr. Whittingham, on behalf of senders, had called and complained of the cases not having been sent on. He was told the rate at Company's risk would be 55s. per ton, and 10 per cent. for insurance. This case was first tried at the London Sittings, after Hilary, 1858, and a verdict given for the Company; then, on appeal in the

Queen's Bench, July 3, 1858, this verdict was reversed. The Company then appealed to the Exchequer Chamber, January 12, 1860, and obtained a Judgment in their favour. The Plaintiff then appealed to the House of Lords, and Lord Westbury (Lord Chancellor) gave Judgment. He said—"The question depends almost entirely upon the construction to be given to the 7th section of the Railway Traffic and Canal Act, 1854. I concur with Chief Justice Jervis in the interpretation of that section given in *Simon* v. *Great Western Railway*. I take the true construction of that section to be equivalent to a simple enactment that no general notice given by a railway company shall be valid in law for the purpose of limiting the common law liability of the companies as carriers. Such common law liability may be limited by such conditions as the Court or Judges shall determine to be 'just and reasonable,' but with this proviso, that any such condition so limiting the liability shall be embodied in a special contract in writing between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person. It is true the section is expressed in a confused manner. The first point is—is the condition on which the Company in the present appeal rests its defence a 'just and reasonable' condition? The Act expressly states that any condition having for its object to relieve the company from liability occasioned by the neglect or default of such company shall be null and void. If the present condition had been embodied in a contract it would then exempt the Company from responsibility for injury, however caused, including, therefore, gross negligence, and even fraud or dishonesty, on the part of the Company's servants. I am of opinion that this is a condition which it would have been the duty of a Court or Judge to hold to be neither just nor reasonable. The second point is (although in truth the first point would dispose of the whole case), whether there does exist any special contract in writing embodying the condition, and signed by the owner of the goods. It is insisted by the Company that that requisition of the statute is answered and fulfilled by the letter of 1st August. I am clearly of opinion that there is no foundation for that contention; and I am also of opinion that it is not

competent, by any description of parol evidence, so to interpret the words 'not insured' as to embody or incorporate the condition itself into the letter, and thereby make it a special contract in writing. In order to embody in the letter any other document or memorandum or instrument in writing, so as to make it part of a special contract, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing that, by force of the reference, the writing itself becomes part of the instrument it refers to. I am, therefore, of opinion that, even if the condition had been just and reasonable, there would not be found any special contract in writing sufficient to answer the exigency of the 7th section. On every ground, therefore, my Lords, I humbly submit to your Lordships that the Judgment of the Court of Exchequer Chamber is wrong, and that the Plaintiff is entitled to a verdict." Lords Cranworth and Wensleydale concurred. Verdict against Company.—*Tried in the House of Lords, July*, 1863.—*From House of Lords Reports, vol.* 10, *page* 473.

169. *Maljee Sewjee* v. *Great Indian Peninsular Railway Company.*—Action for 4,436 rupees (£443 12s.) for loss by fire of 58 docras (bales) of Oomerawutie Akote cotton, equal to 9 candies (266 lbs.), at 475 rupees per candy—Sheagaum to Bombay. These docras are bags of unpressed cotton weighing about 120 lbs. each ; the bags are filled by men standing in them and stamping the cotton down with their feet. They were loaded in open waggons, and the load, though only about three tons per waggon, stood very high and exposed, requiring two large tarpaulins to cover it. The cotton left Sheagaum the 15th January, 1865, on a train of 45 waggons. When within about two miles of Bhandoop Station the driver observed some of the waggons on fire; the train was stopped, and the burning waggons detached from the rest of the train. The driver and guards pulled the cotton down from the burning waggons, but the fire had obtained too great a hold to save the cotton. Five waggons of cotton were burnt, including Plaintiff's 58 docras. The heat was so intense that the sleepers were burnt and the rails became red hot and twisted. The driver swore he was burning coke on the day in question, and he could only account

for the fire on the theory of spontaneous combustion. The Plaintiff had no witnesses to call, but contended that the notice on the back of the Company's receipt had not been brought home so as to exonerate the Company from their common law liability. The theory of spontaneous combustion could not be entertained, as the Company's agent at Sheagaum admitted the cotton was perfectly dry on receipt. As to the cause of fire, there was no evidence, but it was certain it took fire upon the journey, and the Company were consequently liable. It was for the Company to prove there was no negligence. The agent at Bhandoop admitted he saw smoke issuing from the funnel of the engine, so that coal must have been used in the engine. Plaintiff contended that combustion could not have been produced unless by sparks from the engine. The Company admitted the cotton had been burned, though from no fault of theirs, but by accident; that the cotton had been entrusted to the Company upon a special agreement printed at the back of the receipt, and according to that agreement the Company were not responsible for fire. The notice of conditions of carriage was printed in English, together with a notice in the vernacular languages, to the effect that translations of this notice in Guzerathi and Marathi were placed in all the stations of the Company, and could be seen by those who wished.

The Judge said that it rested with the Plaintiff to prove negligence. No evidence was given to show coal was burned in the engine, while the driver swore coke was burned. Nobody could assign the cause of the fire. It might have arisen from spontaneous combustion or from sparks from the engine. If there had been sparks seen issuing from the engine he should have called upon the Plaintiff to show the engine was worked with negligence, and that an unusual quantity of sparks were emitted. If the sparks occurred when the engine was driven with the usual material, he should still hold that the notice (special agreement) given to the Plaintiff when the cotton was delivered for conveyance would prevent the Company from being liable. It had been held in England that a mere spark from the engine does not render a railway company liable. It rested with the Plaintiff to show that the fire arose from carelessness. The fire was promptly detected, the cotton was accepted in a proper

state, no improper material was used in the engine, and there was no evidence to show the fire arose from negligence or default of the Company. He held that the receipt for the cotton was a proper notice to Plaintiff that the Company would not be responsible. The receipt was in English, and the person who received it admitted that he understood it. He was of opinion the Judgment must be for the Company on the three issues—(1) Whether the 58 docras were destroyed by fire; (2) whether the contract between the parties was that the Defendants should be liable for loss by fire; (3) whether the loss was occasioned by the negligence or other fault of the Defendants or their servants. Judgment for Company, with costs. – *Tried in High Court of Bombay, October* 4, 1866.—*Taken from Report of Times of India, October* 6, 1866, *and the Author's Notes.* (During several years the Company had paid many thousands of pounds for cotton burnt. This decision obtained by the author put a stop to further payments, and it is to be regretted such decision had not been obtained earlier.)

170. *Genister v. Great Western Railway Company.*—Action for £15 15s. for damage to eleven dozen chairs. Such damage occurred from the waggon in which the chairs were loaded being thrown off the line and smashed, owing to the engine of the train having run over some cattle. The chairs were accepted at High Wycombe for carriage to London, and were to be carried at owner's risk, the usual special contract being signed. On the 2nd October, after 10 p.m., the goods train that took on the chairs arrived at High Wycombe. This train brought some cattle for Wycombe, and stopped at the passenger platform, and, to expedite matters, the cattle were unloaded at the passenger platform instead of at a siding at the goods station. The cattle passed through a wicket gate off the platform into the outer station yard, which is in front of the station, and adjoins and leads into the public highway. The drovers did not sign any receipt for the cattle, and the animals, in fact, never left the Company's premises. The cattle, when through the wicket, took the wrong direction, ran on to the station sidings, and thence on to the main line in the direction of London, and the drovers followed them. In the

meantime the train had taken on the waggon of chairs and started for London. When the engine was about a mile past High Wycombe, it ran over two beasts, and the accident occurred. The case was first tried at the High Wycombe County Court, when the Jury found a verdict for Plaintiff, £15 1s. 3d. The Company appealed, and on the appeal case Justice Blackburn said—"In this case the Great Western Railway Company, being common carriers, carry goods as insurers, and owners can avail themselves of those terms when they please; they can also carry at a less price with less risk, provided the conditions be reasonable. There is no pretence here that the condition in this case is prohibitive because the Plaintiff cannot adopt alternative terms of carriage, nor because the condition is unreasonable. What we have really to decide is the terms of the contract, and I understand the condition to relieve the Company from all liability except for damage which might be caused by the 'wilful misconduct' of their servants. It is admitted that there was no malice in what the servants did here; and I fully agree with the County Court Judge that there may be many cases of 'wilful misconduct' without malice —for instance, if railway servants were to shunt trucks of cattle into a siding and leave them unattended for twenty-four hours, or if a railway company were, for economy, knowingly to expose cattle to a risk which they incurred thereby. Here, however, the circumstances do not, in my opinion, amount to wilful misconduct, and I think the Judge was wrong in directing the Jury that culpable negligence was necessarily wilful misconduct. The cattle were driven into the yard which communicated with the line. This was not the usual course of proceeding, but the object of doing so on this occasion was to deliver the cattle to their consignees that night. Probably there were not enough men to look after them, or there may have been some neglect by the Company's servants, but I cannot see how they can possibly be said to have been guilty of wilful misconduct. There is nothing to show that what they wilfully did—that is, drive the cattle into the yard—was likely to cause injury to the Plaintiff's goods, or that they had knowledge of any danger to which they were exposing either the cattle or the train by what they did." Justices Quain and Archibald concurred. Judgment

for Company.—*Tried in Court of Queen's Bench, November* 13, 1873.—*From Law Times Reports, vol.* 29, *page* 423.

171. *D'Arc* v. *London and North Western Railway Company.*—Action for injury by wet to a wax figure, arising from delay and mis-sending. The consignment consisted of 120 packages of a wax-work exhibition, and was carried, Chester to Halifax, on October 31. One case was not delivered until November 7, when the figure inside was found damaged. Sender had an option of rates, and selected the lower or owner's risk rate, remarking on docket, "Forward packages at our own risk." The case was first tried at the Liverpool Court of Passage, when the Jury held that there was negligence in the Company causing delay, and that the wet was caused by negligence. Verdict against the Company. The Company appealed to the Court of Common Pleas, when Justice Denman said—"If the loss of the goods on the railway, or their delay and consequent damage, had been the probable risk evidently in the contemplation of the sender, then possibly *Simons* v. *Great Western Railway* would have applied; but it is unnecessary to look further, as *Robinson* v. *Great Western Railway* is exactly in point, and we could not here decide for the Company without overruling it." Chief Justice Coleridge and Justice Brett concurred. Judgment against the Company.—*Tried in the Court of Common Pleas, May* 7, 1874.—*From Law Times Reports, vol.* 30, *page* 763.

172. *Lewis* v. *Great Western Railway Company.*—Action for £70 for damage to 156 cheeses, London to Shrewsbury. The cheeses were loaded in an open truck, placed on their rims in two tiers, and were crushed and broken to pieces; the oil in them was pressed out and running from them, and their selling value much diminished. The Company's carts collected the cheese from Tooley Street, and the carter received sender's printed consignment note as follows :—

"Great Western Railway Company.—Please receive and forward to Mr. George Lewis' order, Market Hall, Shrewsbury [here followed particulars of cheese, with marks, &c.] Owner's risk.—From W. J. Hutchinson."

Sender was examined, and admitted he was in the habit of

sending goods at the lower (owner's risk) rate, and was aware of the Company's conditions. The Company put in their form of consignment, printed on yellow paper, which set forth the conditions upon which goods were carried at the lower rate, viz.:—

Great Western Railway—Consignment of Goods to be carried at Owner's Risk. —"The Great Western Railway Company hereby give notice that they have two rates for the conveyance of certain articles—one the ordinary rate, when they take the liability of the carrier; the other a reduced rate, adopted when the sender relieves them of all liability of loss, damage, or delay, except upon proof that such loss, damage, or delay arose from 'wilful misconduct' on the part of the Company's servants.

"To the Great Western Railway Company, —— Station. ——, 187 . Receive and forward the —— undermentioned goods, to be carried at the reduced rate below the Company's ordinary rate, in consideration whereof I undertake to relieve the Great Western Railway Company, and all other Companies over whose lines the goods may pass, from all liability in case of damage or delay, except upon proof that such loss, detention, or injury arose from 'wilful misconduct' on the part of the Company's servants. I also agree to the conditions and regulations on the back of this note."

The Plaintiff contended that the special contract had no application to the default of the Company for negligently and unskilfully packing and carrying the cheese, and that the injury did arise from "wilful misconduct" on the part of the Company's servants. The Plaintiff also contended that the terms were unjust and unreasonable. Plaintiff gave evidence to show that so large a quantity of cheese required at least three trucks, and that each cheese ought to have been laid on the flat and not on the rim, and only in one layer; that the great Cheshire cheeses, being heavy and of unequal size, were usually so packed when carried by the Company (although cheeses of a smaller kind might be placed on the rim and in tiers).

The Company contended that under the special contract they agreed to carry, and did carry, the cheese at a lower rate than the ordinary rate; that the damage was "caused by the inherent vice or quality of the said cheese;" and that on receipt they were damaged.

On the counterfoils of sender's consignment note, signed by the carter, the words "Owner's risk" also appeared.

The case was first tried before Justice Lopes and a Special

Jury, at the Shropshire Summer Assizes, 1877. The Judge held that the Company were protected from liability by the condition as to "owner's risk;" that it was a reasonable condition; and there was no evidence of "wilful misconduct" on the part of the Company, there being no evidence that the Company's men knew how to pack cheese.

The Judge gave leave to appeal, and "the Court of Appeal to draw inferences of fact, and to amend if they think fit."

Lord Justice Bramwell, in giving Judgment, said—"I think that in this case the Judgment of the Court below must be affirmed. The contract is set out in the blue ticket (sender's consignment note), and the decision in *Peek* v. *North Staffordshire Railway Company* shows that a special contract is not valid unless signed, and it is for us to interpret it. The contract has on the face of it these words—'Owner's risk.' I do not think you ought to look at the yellow paper (the Company's form of risk note), as in the blue ticket no reference whatever is made to the yellow one. Here the Company propose to carry under two agreements, one of ordinary liability as carriers, and the other at the owner's risk. There is evidence here that the sender forwards them at owner's risk, but plus the liability of the Company for the 'wilful misconduct' of their servants. It has been decided that contracts, although in writing, must be signed to satisfy the statute. In *Peek* v. *North Staffordshire Railway Company* the alternative was unreasonable, but here the sum is authorised by the Act. Here is an option given to a man: 'We will take the ordinary liability of a carrier, or else pay us less and take the risk yourself, except that of the "wilful misconduct" of our servants.' How can we say this is unreasonable? Then, was this damage caused by the 'wilful misconduct' of the Company's servants? 'Wilful misconduct' is misconduct to which the will is a party. If the person, therefore, whose act it is, knows that the act will result in mischief, then his act is wilful misconduct, and, indeed, I go further, and think that it would be wilful misconduct if a man were to do the act not caring whether or not the result might be bad. There is no evidence of 'wilful misconduct,' as I do not think that the London porters knew that they were doing wrong." Lord Justice Brett and Lord Justice

Cotton concurred. Judgment for Company.—*Tried in the Court of Appeal, December* 21, 1877.—*From Law Times Reports, vol.* 37, *page* 774.

This is a very important decision for railway companies, and should be acted upon in all cases, so as to further establish the law on the points contested—(1) That the simple remark of "Owner's risk" on sender's consignment, put on with full knowledge and intent, is as good, if the note be signed, as the companies' elaborate form of risk note. (2) That in the face of section 7 of the Railway and Canal Act (17 & 18 Vic., cap. 31), a railway company can make a special contract exempting itself from all but "wilful misconduct," provided the option of two rates be afforded the trader.

173. *Haynes* v. *Great Western Railway Company.*—Action for £7 16s., damage done to two horse rakes carried at owner's risk, Wenlock to Newark. The damage consisted in the breaking of one of the axles measuring one and three-quarter inches diameter, in the shafts of two wheels being bent, and in many of the teeth of the rakes being bent and twisted. Sender signed the usual risk note, and had the option of the two rates. The case was first tried in the Madeley County Court, and the Plaintiff contended that the railway truck upon which the rakes were loaded was too short for them, and that this constituted "wilful misconduct." Plaintiff obtained a Judgment. The Company then appealed to the Court of Common Pleas, when Justice Grove said—"The condition which the Plaintiff has signed, and which we must take for the purpose of this case to be a reasonable condition, is as follows :—'I undertake to relieve the Great Western Railway Company, and all other Companies over whose lines the goods may pass, . . . from all liability in case of damage, . . . except upon proof that the injury arose from the wilful misconduct of the Company's servants.' It is therefore necessary for the Plaintiff in an action of this description to prove, that is, to give reasonable evidence upon which a Jury might be directed, in the absence of contradictory evidence, to find that the injury arose from some 'wilful misconduct' on the part of the Company's servants. I am of opinion that there was not reasonable evidence here

to entitle the County Court Judge to infer that the injury complained of did arise from such wilful misconduct. The injury may have been the consequence of improper packing on the trucks of the Company's servants. It is also possible that improper packing might have arisen from wilful misconduct. But evidence sufficient to support the Plaintiff's case, and to call upon the Company for an answer, must go further than that. It must point out such circumstances that a Jury might reasonably infer that the damage arose from the cause alleged, and not from any other cause. 'Wilful misconduct' is a strong expression. As Lord Justice Bramwell points out, in *Lewis* v. *Great Western Railway*, it is stronger than the phrase 'wilful negligence,' because it involves something in the nature of a wrong action, something that is not mere negligent omission, but wrong conduct on the part of the servants of the Company. I may borrow the definition which is given by Lord Justice Brett, in the same case, of one branch of wilful misconduct—'Or if he does, or omits to do, something which everybody must know is likely to damage the goods, then he is doing that which he knows to be a wrong thing to do.' Now, I certainly cannot undertake to say that placing upon a truck rakes longer than the truck itself necessarily imports wilful misconduct. It would be monstrous to contend that it was wilful misconduct on the part of the Company not to put a guard in every carriage of a goods train to take care of the inanimate objects conveyed in it, and the part of the case which states that no one travelled with the rakes may therefore be dismissed without further comment." Justice Lopes concurred. Judgment for Company.—*Tried in Court of Common Pleas, Nov.* 7, 1879. —*From Law Times Reports, vol.* 41, *page* 437.

Damage by Leakage.

(See also under "Warehousemen.")

	Case No.		Case No.
Lyon v. *Mells* (1804)	174	*Phillips* v. *Edwards* (1858) ...	177
Beck v. *Evans* (1812)	175	*Ohrloff* v. *Briscall* (1866)	180
Phillips v. *Clark* (1857)	176		

DIGEST.

In *Lyon* v. *Mells* (1804) several bales of yarn were damaged by wet to the value of £274 during conveyance by water in a barge that leaked. It was held that the conveyance used for the transit must be in fit and proper order for the purpose, and a barge leaking was held to have been unfit, and the carrier was consequently held liable.

In *Beck* v. *Evans* (1812) a cask of brandy sent per road, Shrewsbury to London, was observed to be leaking at Birmingham, and also at Wolverhampton; yet no attempt, until after passing Wolverhampton, was made to stop the leakage. Lord Ellenborough, on appeal, confirmed the verdict against the carrier, and held that the carrier's notice did not afford the carrier exemption from his own (or servants') misfeazance.

In *Phillips* v. *Clark* (1857) 13 butts sherry were carried, London to Calcutta and back to London, and they were damaged by breakage and leakage. There was a special contract involved. (*See* "*Special Contracts*"—*Leakage.*)

In *Phillips* v. *Edwards* (1858) a cask of brandy in the hold of a steamer, Bristol to Falmouth, became "staved, broken, and damaged." The carrier proved his notice on sailing time-bills, and Chief Baron Pollock held him not liable for the leakage.

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174. *Lyon* v. *Mells.*—Action for £274 for damage by wet from leakage to several bales of yarn in a lighter between the quay at Hull and a vessel lying in one of the docks there. The carrier relied upon his notice as to not being liable for any

damage over 10 per cent. unless such loss or damage should happen or be occasioned by want of ordinary care and diligence on the master and crew of the vessel. Lord Ellenborough said —" In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that his vessel is tight, and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so. The law presumes a promise to that effect on the part of the carrier without any actual proof, and every reason of sound policy and public convenience requires it should be so." Judgment against carrier for £274.—*Tried in Court of King's Bench, June* 19, 1804.—*From East's Reports, vol. 5, page* 436.

175. *Beck* v. *Evans.*—Action for part loss out of a half a cask brandy by leakage, Shrewsbury to London. This is a case under the old Carriers' Act, when goods were carried by road carriers. Before the waggon reached Birmingham it was noticed by the passengers in the waggon that the cask was leaking, and the waggoner was warned. There was a stoppage of three hours at Birmingham, but no attempt was made to stop the leakage. Wolverhampton, where the waggon made some stay, was passed in like manner. At the next stage beyond Wolverhampton, having some parcels to deliver out of the waggon, the cask was taken out, and the remainder of the brandy saved. The carrier relied upon a notice as follows:—

"The proprietors of the London and Salop waggons give notice they will not be answerable for cash, bank notes, writings, jewels, plate, watches, lace, silk, hose, wool, muslins, china, glass, paintings, *or any other goods of what nature or kind soever*, above the value of £5, if lost, stolen, or damaged, unless a special agreement is made and an adequate premium paid over and above the common carriage," &c.

The Judge held that this notice did not apply, but referred to packages the value of which the carrier could not discriminate, but that he must have known a cask actually worth £70 was over £5 in value. He left it to the Jury whether the injury arose from negligence of the waggoner in not examining

the cask when advised it was leaking. Verdict for Plaintiff. The carrier appealed. Lord Ellenborough confirmed the verdict, and held that the notice did not afford the carrier exemption from his own (or servants') misfeazance. Judges Grose, Le Blanc, and Bayley agreed. Judge Le Blanc said the notice would exempt a carrier from liability where the goods were of much larger value than from a knowledge of their bulk or quality the carrier could possibly guess them to be.—*Tried in the Court of King's Bench, Nov.* 11, 1812.—16 *East's Reports, page* 244.

176. *Phillips* v. *Clark.*—Action for damage by breakage and leakage to 13 butts sherry, carried from London to Calcutta and back to London. In the margin of the bill of lading was inserted—"Weight and contents unknown; not accountable for leakage or breakage." It appeared the damage arose from negligence in the stowage of the wine.

Chief Justice Cockburn said—"I admit that a carrier may protect himself even from the effects of his own negligence by a contract to that effect, if he can find anyone to contract with him. I think, however, that we ought not to put that construction on a contract unless it is unambiguous in its terms. The question, then, is whether, looking at the terms of this contract, we can see that a person delivering his goods under it has done so on the understanding that the carrier might deal with them negligently without being responsible. I do not think we can do so." Justice Crowder said—"The fallacy in the Defendant's argument is looking only at what the captain intended. It is said that his intention was to free himself from all responsibility. In order to do that he ought to have expressed in clear terms that he was not to be liable for leakage or breakage, arising from whatever cause. Leakage and breakage very often occur by mere accident, where the captain of the vessel is not to blame, and it seems it was that which both parties intended to refer to in the stipulation in the bill of lading, and that it was never intended to release the captain from that which should be caused by an act of his. It must be leakage and breakage of which the captain has not been the cause. If we were to include leakage and breakage by the

negligence of the captain, that would be adding another term to the bill of lading." Judgment against carrier.—*Tried in Court of Common Pleas, April* 23, 1857.—*From Law Journal Reports, vol.* 26, *page* 168. (In considering this case it must be remembered that ship carriers are not controlled by sec. 7, Railway and Canal Act, where the Judge may hold the terms of the special contract "unjust and unreasonable.")

177. *Phillips* v. *Edwards.*—Action for the value of a cask of brandy which in the hold of a steamer became "staved, broken, and damaged," and the brandy lost—Bristol to Falmouth. On the Company's printed time-bills, of which Plaintiff had a copy, notice was given as follows:—"The owners also give notice that they will not receive any goods for conveyance by their vessels except upon the terms that they shall not be responsible for any loss or damage of or to such goods from any cause whatever during transit." In the freight note was also a notice:—"The owners do not hold themselves responsible for leakage of oils, spirits, or other liquids, or breakage of glass or furniture, unless from bad stowage." There was no evidence to show how the cask got staved. The case was first tried before Baron Watson at Bristol Assizes, when the verdict was for Plaintiff, with leave to appeal as to whether or not there had been a special contract.

On the appeal, Chief Baron Pollock said—"We are of opinion that the contract is to be taken from the notice given in the papers in respect of the time of sailing which were communicated to the public, and it distinctly appears that the Plaintiffs were aware of these terms. The only difficulty appears to have arisen from there being a freight note the terms of which did not correspond with the terms of what may be called the advertisement; and it was contended, upon the authority of a case cited, that when there were two sets of terms in the course of dealing, the carrier who set up the notice was bound to consider that as a binding agreement which was least favourable to himself and most favourable to those he dealt with—a rule of law which is perfectly clear and free from doubt. But it appears to us, on looking at the freight note, that it is quite manifest that it did not refer to the case of

goods sailing from the port, but to goods arriving at the port; and we have come to the conclusion that the freight note was probably used by mistake on this occasion. It may be observed that the contract is that which is formed at the time the goods are delivered, and that the freight note was a matter occurring afterwards." Judgment for carrier.—*Tried in Court of Exchequer, Nov.* 23, 1858.—*From Law Journal Reports, vol.* 28, *page* 52.

DAMAGE FROM DETERIORATION OR NATURAL VICE.

	Case No.		Case No.
Farrar v. *Adams* (1817)	178	*Ohrloff* v. *Briscall* (1866)	180
Bull v. *Robison* (1854)	179	*Kendal* v. *L. & S. W.* (1872) ...	743

DIGEST.

In *Farrar* v. *Adams* (1817) Justice Holt said—"If an action were brought against a carrier for negligently driving his cart so that a pipe of wine burst and was lost, it would be good evidence for the Defendant that the wine was upon the ferment, and when the pipe burst he was driving gently."

In *Bull* v. *Robison* (1854) hoop iron, owing to its "sweating," became damaged by rust in transit, Staffordshire to Ellesmere Port. Baron Anderson, on appeal, said—"There was no express contract in this case. The consignee was bound to accept an article if only deteriorated to the extent which it is necessarily subject to in its course of transit from one place to another." Judgment for carrier.

In *Ohrloff* v. *Briscall* (1866) oil, to the extent of 2,000 gallons, leaked out from casks during the voyage, Leghorn to Liverpool. The casks started owing to heat, generated by rags and wool stowed in the ship with the oil. In margin of bill of lading was the remark—"But the measurement and contents not known, and not accountable for leakage." Carrier held not liable, the damage arising from the natural vice inherent in the cargo.

In *Kendal* v. *London and South Western* (1872) it was a question of a horse. Baron Bramwell said—"There is no doubt in this case the horse was the immediate cause of its own injuries; that is to say, no person got into the box and injured it. It slipped or fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, 'its proper vice'—that is to say, from fright, or temper, or struggling to keep its legs—the Company are not liable. If perishable articles, say soft fruit, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities."

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178. *Farrar* v. *Adams.*—"For misbehaviour in a trust or duty, an action on the case will lie, for whosoever undertakes to do a thing for another ought to do it faithfully, else he is answerable for the damages arising from his negligence or misbehaviour: therefore, if a man deliver goods to a common carrier to carry, and the carrier lose them, an action on the case will lie against him; but if there appear to be no default in the Defendant the Plaintiff shall be non-suited, as if an action were brought against a carrier for negligently driving his cart so that a pipe of wine burst and was lost, it would be good evidence for the Defendant that the wine was upon the ferment, and when the pipe burst he was driving gently."—*E.* 10 *Ann., per Holt, at Guildhall.—Salk MSS.; Buller, N.P.* 69, 1817.

179. *Bull* v. *Robison.*—Action for damage by rust to hoop iron owing to its "sweating," which occurred in transit between Staffordshire and Ellesmere Port. The Plaintiff was the manufacturer and the Defendant the Liverpool merchant. The contract was to supply a quantity of hoop iron in the months of January and February, and it was understood it should be forwarded by canal boats. Owing to frost the boats were detained at Middlewich some weeks; Defendant refused the iron because of the damage. The Judge directed the Jury that the Defendant was entitled to have the hoop iron delivered to him in merchantable condition. Verdict for Defendant. On appeal, Baron

Anderson reversed this decision—"There was no express warranty in this case. The Plaintiff made merchantable hoop iron, and he was bound to deliver the iron in a certain state and condition; but Defendant must accept the iron if it be only so far deteriorated as all such iron must necessarily be deteriorated in transit from Staffordshire to Liverpool. If a man make an express contract to deliver in Liverpool hoop iron in the very same condition as when first manufactured, he must bear the consequences of his bargain. There was no such contract made nor implied in this case. *The consignee is bound to accept an article if only deteriorated to the extent which it is necessarily subject to in its course of transit from one place to the other.*"—*Tried in Court of Exchequer, July* 7, 1854.—24 *Law Journal* (*Exchequer*), *page* 165.

180. *Ohrloff* v. *Briscall*—Action for damage arising from a loss of 2,001 gallons of oil lost by leakage, on the voyage from Leghorn to Liverpool, out of a consignment of 47 casks of olive oil.

Under a charter-party the shippers put a cargo, consisting of casks of oil, wool, and rags, on board the chartered vessel, and personally superintended the stowage of the cargo in the hold of the vessel. In the margin of the bill of lading of the casks of oil there was this memo.—"But the measurement and contents not known, and not accountable for leakage." The bill of lading was indorsed in blank by the shippers, and assigned to Briscall & Company. In the course of the voyage the oil casks became heated by the action and contiguity of the wool and rags, and a very large portion of the oil was lost.

Held, in a suit against the ship, under the provisions of the Admiralty Act, 1861, for damages occasioned by the shipowners' negligence—First, that ignorance of the shipowners as to the latent effect of heat in storing the casks of oil with wool and rags did not, in the circumstances of the shippers superintending the stowage, amount to such negligence as to make them liable to the holders of the bill of lading for the loss occasioned by the leakage of the oil; secondly, that the limitation of liability by the memo. in the bill of lading, that the shipowners were not to be accountable for leakage,

was not restricted as to the quantity of leakage, and protected the shipowners in the absence of proof that the leakage was occasioned by their negligence.

Where the conduct of the shippers as to the stowage was not such as by the "Bills of Lading" Act, 18 & 19 Vic., cap. 111, would support a plea of leave and license in an action by the indorsees of the bill of lading. Judgment for carrier.—*Tried in the Court of Privy Council, June*, 1866.—*From Law Reports, Privy Council Appeals, vol.* 1, *page* 231.

Miscellaneous.

(*Damage and Loss of Goods.*)

	Case No.		Case No.
Morse v. *Slue* (1670)	181	*Ingate* v. *Christie* (1850)	185
Golding v. *Manning* (1773) ...	222	*Latch* v. *Rumner Railway* (1858)	184
Davis v. *Willan* (1817)	182	*Lewis* v. *G. W.* (1860)	167
Beckford v. *Crutwell* (1832) ...	183	*Patterson* v. *B. & N. C.* (1882)	186

DIGEST.

In *Morse* v. *Slue* (1670) a package containing a great sum of money was delivered to a carrier, and contents declared as silk. The carrier, although robbed, was still held liable for the loss.

In *Golding* v. *Manning* (1773) a box of silk was carried to London; on arrival, the address of consignee was illegible, but the name Samuel Ireland was on the address and way-bill. The box remained on hand twelve months before being claimed, when the silk was found to be damaged to the extent of £29. Judge Gould held that the carrier, by the directory, should have found consignee and delivered the box in the usual way. Judgment against carrier.

In *Davis* v. *Willan* (1817) money, bills, and notes were lost, Stamford to London, by coach. This was before the time of the Carriers' Act. The Judgment was against the carrier, because the Judge considered

he had not brought home to the Plaintiff the special contract set forth in his (the carrier's) notice.

In *Beckford* v. *Crutwell* (1832) the action was for not safely carrying a picture, value £80, and the carrier was held liable because he did not send more than one waggoner with seven horses.

In *Ingate* v. *Christie* (1850) 100 cases of figs being carried in a lighter on the Thames were lost from the lighter being run down and sunk. The case turned on the question of common carrier and special carrier. (*See that section.*)

In *Latch* v. *Rumner Railway* (1858) several "owner's waggons" were thrown off the line owing to a stone having been inserted by a stranger under the lever of one of the points connecting a siding with the main line. Chief Baron Pollock, on appeal, said there was no evidence of negligence on the part of the Company. The verdict of the Court below was clearly contrary to the evidence, and there must be a new trial.

In *Lewis* v. *Great Western* (1860) among several packages of furniture was a bag of clothes. Twelve days after delivery consignee discovered the bag contained empty corn sacks, and not the clothes. Plaintiff had signed a note on which were conditions that claims for loss must be made in seven days, and for deficiency, damage, or detention, in three days after delivery. Chief Baron Pollock, on appeal, held the condition to be reasonable, and the Company were not liable for the loss of the clothes.

In *Patterson* v. *Belfast and Northern Counties Railway* (1882) eggs were broken and damaged, Ballymoney to Paisley. The case turned on the special contract. (*See "Special Contracts where sender had, or should have had, the option of two rates."*)

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181. In *Morse* v. *Slue* (1670), tried in the Court of King's Bench in the 24th and 25th of Charles II., it was stated there was a case not long since when one brought a box to a carrier

in which there was a great sum of money, and the carrier demanded of the owner what was in it; he answered that it was filled with silks and such like goods of mean value, upon which the carrier took it, and was robbed. And resolved that he was liable. But if the carrier had told the owner that it was a dangerous time, and if there were money in it he durst not take charge of it, and if the owner had answered as before, this matter would have excused the carrier.—*Sir Peyton Ventris' Reports, part* 1, *page* 238.

182. *Davis* v. *Willan.*—Action for loss of money, bills, and notes, delivered to a stage coach proprietor to carry, Stamford to London, and lost. The carrier contended (1) the parcel did not contain the valuables alleged; (2) sufficient notice had been given by him of his limit of responsibility as a carrier. Justice Abbott explained to the Jury the necessity of a special contract being proved, in order that the carrier can relieve himself in common law. It is essential that the carrier should bring the knowledge of the special contract plainly and clearly to the mind of the party who deals with him, that he intends so to limit his liability. In order to do this, it has been the most usual course to put up a notice in the office; but it may happen that the party cannot read, but this is the misfortune of the carrier or his fault that he does not communicate his intention by some other means: the bookkeeper may inform him. In this case, notice was stuck up in the office, but it seems that it gave no information to the party, since he was unable to read, and I think that notice has not been sufficiently brought home to the knowledge of the party.—*Tried at Nisi Prius*, 1817.—*From Starkie's Reports, vol.* 2, *page* 279. *See also Kerr* v. *Willan, Starkie* 2, *page* 53.

183. *Beckford* v. *Crutwell.*—Action for not safely carrying a picture, value £80, London to Bath, by road carriage. The carrier had seven horses attached to his van, but only one waggoner. Lord Tenterden left it to the Jury if the leaving the waggon and seven horses to the care of only one waggoner was taking such reasonable care as the common law imposed upon carriers, and from which even the carrier's notice could not protect him. The Jury found gross negligence in employing

only one waggoner. Judgment against carrier.—*Tried at Nisi Prius, June* 20, 1832.—*From Carrington and Payne's Reports, vol. 5, page* 242.

184. *Latch* v. *Rumner Railway Company.*—Action for injury to "owner's waggons" thrown off the line owing to a stone having been inserted by a stranger under the "lever" of one of the points connecting a siding with the main line. The case was first tried before Baron Martin at the Monmouth Summer Assizes, 1857, when the Judge said he thought there was no evidence of actual negligence, and told the Jury that if the Company's account was correct they were entitled to the verdict, unless the Jury thought there was negligence in not having a person to take care of the points at the place in question, which he did not think there was. Jury gave a verdict for Plaintiff. The Company appealed, and on the motion for a rule Chief Baron Pollock and Barons Martin, Watson, and Channell gave the following Judgment:—"There was evidence that there had been a wilful act on the part of a stranger which would have caused the accident, and no evidence of negligence on the part of the Company. None was suggested, except their not having a person always at the spot to look after the 'points,' which they were not bound to have. The siding had been in that state for months, and no accident had happened. The verdict was clearly contrary to the evidence, and there must be a new trial." Verdict for Company.—*Tried in the Court of Exchequer, January* 13, 1858.—*Law Journal Reports, vol.* 27, *page* 155 *(Exchequer).*

185. *Ingate* v. *Christie.*—Action for £143 8s. 9d., value of 100 cases of figs that were being carried in a lighter from Mill's Wharf, London, to the "Magnet." The lighter was run down by the "Menai" steamer, and the figs lost.

Baron Alderson said—"Everybody who undertakes to carry for anyone who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for everyone, but carries for you and me only, that is

a matter of special contract. Here we have a person with a counting-house, "Lighterman" painted at his door, and he offers to carry for everyone. Mr. Justice Storey is a great authority, and if we would but adhere to principle the law would be what it ought to be, a science. There may be cases on all sides, but I will adhere to principle if I can. Verdict for Plaintiff for £143 8s. 9d.—*Tried at Nisi Prius, April* 30, 1850.—*From Carrington and Kirwan's Reports, vol.* 3, *page* 61.

186. *Patterson* v. *Belfast and Northern Counties Railway.* —The Appellants in this case are egg merchants, trading in Ballymoney under the firm of F. Patterson & Son, and the sum sought for against the Respondents was £5 14s. 10d., being the amount of loss and damage alleged to have been sustained by Plaintiffs in consequence of a box of eggs which they had transmitted on the railway of the Respondents having been damaged through their servants' negligence on their way between Ballymoney and Paisley. Mr. Shaw (instructed by Mr. Martin) appeared for the Appellants; and Mr. Orr (instructed by Mr. A. O'Rorke) appeared for the Respondents.

Evidence having been given, Chief Baron Palles, in delivering Judgment, said—"There is a very small amount in dispute, but the principle involved is one of the greatest importance, and has undergone the greatest consideration in England, and it is no reason why I should make a decision that cannot be sustained in point of law because the amount that is involved will be a very small one. I assume that the rate that has been charged here is a rate very much within the statutory powers of the Company, and I also assume that if the Company had only one rate—viz., 35s. a ton—that would be a reasonable rate. But the Act of Parliament, right or wrong, requires something more to authorise the Company to make what to my mind is an unreasonable contract—that is, to carry under such circumstances that they shall not be liable for their own negligence—and that which the Act of Parliament, as now construed, requires is that if there are two rates the two rates shall be reasonable *inter se;* and the question I have to consider is not whether 35s., if it were one rate only, would be a reasonable rate, but whether, upon the assumption that 27s. 6d. is a reasonable rate carrying

at the owner's risk, 35s. is or is not an unreasonable rate when it is carried on the ordinary liability of the Company—that is, an addition of upwards of 25 per cent. to the lower rate. I am not prepared to say that under certain circumstances, and it being very clearly shown that the Company could not carry without loss at that higher rate, provided they incurred the ordinary liability to carry, that that 35s. may not be held to be a reasonable rate, notwithstanding the lower rate of 27s. 6d.; but of one thing I am clear, and it is upon that I decide this case, that there must be very clear and conclusive evidence that the real value of the additional liability there is upon the Company by carrying under the section contract—that is, that the ordinary liability of the Company in fact—is fairly represented by the additional 7s. 6d. My own belief is, and it is confirmed by the evidence of the manager of the Company, that this was never intended to be a real rate at all, or to be acted upon, and therefore I will reverse and grant the decree—a decree for the amount of £5 10s. 2d., deducting the amount which has been lodged in Court, and which the Plaintiff will get. I also reserve with costs and expenses incurred here and in the Court below." Judgment against Company.—*Tried in Record Court, Belfast, March* 20, 1882.—*From Northern Whig.*

Damage and Loss of Goods by Fire while in Carrier's Charge during the Period of Transit.

(*See also "Goods on Hand—Warehouseman."*)

	Case No.		Case No.
Forward v. *Pittard* (1785) ...	187	*Martin* v. *G. I. P.* (1867)... ...	189
Davis v. *Garrett* (1830)	194	*Scaife* v. *Farrant* (1875)	190
L. & N. W. v. *Glyn* (1859) ...	188	*Chapman* v. *G. W.* (1880)... ...	191
Maljee Sewjee v. *G. I. P.* (1866)	169		

DIGEST.

In *Forward* v. *Pittard* (1785) twelve pockets of hops had been accepted at Weyhill, where an annual fair is held, to carry to Shaftesbury by road. The hops were stored by carrier in a booth; the booth took fire from a

neighbouring booth, and the hops were burnt. Lord Mansfield held that the contract of carriage had commenced, that the carrier was an insurer, that the fire was not by lightning or the act of God, and that the carrier was responsible.

In *Davis* v. *Garrett* (1830) 114½ tons lime, in a barge, was being conveyed, Bewley Cliff to Regent's Canal. The barge deviated from the usual course, and the deviation would appear to have caused delay. A tempest came on and wetted the lime; the barge took fire, and all was lost. It was held that the law implies a duty on the carrier to proceed without unnecessary deviation in the usual course. Judgment against the carrier.

In *London and North Western* v. *Glyn* (1859) a shed containing goods at Camden Station, London, was burnt down. Among the goods was a case of silk, value over £10, which had not been declared. The Company had insured the shed for £15,000 with Glyn (Globe Insurance Company). Glyn contended he was only liable to the Railway Company to such an extent as the Railway Company were liable to their customers. Justice Erle held that Glyn was responsible for the actual value of all goods that had been burnt in the shed.

In *Maljee Sewjee* v. *G. I. P.* (1866) 58 bales of cotton were burnt in transit, as alleged, by sparks from engine. The Company's notice at the back of the receipt that they would not be responsible for fire was proved. The Judge said it rested with Plaintiff to prove negligence. If there had been sparks seen issuing from the engine, he should have called upon Plaintiff to show the engine was worked with negligence, and that an unusual quantity of sparks were emitted. In the absence of negligence being proved, the Company were held not liable.

In *Martin* v. *G. I. P.* (1867) an officer's luggage was destroyed by fire in transit. The luggage was in charge

of a military guard, and carried for the Government as soldiers' baggage. Chief Baron Kelly said—"The pleadings suggest a destruction by fire through the Company's negligence. The Company are liable for this loss, and the Judgment must be against the Company. As to the contract, the Court think that a wrong was done by which the Plaintiff is affected in his property, and for which, therefore, independently of the contract, he has a right to obtain redress."

In *Scaife* v. *Farrant* (1875) the Defendant was a carrier owning furniture vans, and he contracted to carry some furniture from Paignton to Plymouth, using the railway for part of the journey. The furniture was destroyed by fire during transit. Plaintiff signed the following printed form :—

"I hereby agree to pay you the sum of £22 10s. for the removal of my furniture and effects from Paignton to Plymouth, you undertaking risk of breakage (if any), not exceeding £5 on any one article."—H. M. SCAIFE.

Justice Lush held that there was no negligence, that the fire was accidental, that there was a special contract, and that the carrier was not liable, being a special carrier and not a common carrier.

In *Chapman* v. *Great Western* (1880) goods arrived at Wimborne, addressed "To be called for," on the 25th March, and consignee did not apply for them until March 27, during which interval the station and the goods had been burnt. Lord Chief Justice Cockburn held that between the arrival and the fire a reasonable time had elapsed for consignee to have taken his goods away, and that he (consignee) could not prolong the liability of the carrier as *a carrier and insurer* beyond a reasonable time; that the carrier had become a warehouseman of the goods, and was not responsible for their accidental destruction by fire.

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187. *Forward* v. *Pittard.*—Action for the value of twelve pockets of hops to be carried by road from Weyhill to Shaftesbury. The hops were stored by the carrier in a booth until his waggon started. On the night of the following day after

delivery a neighbouring booth 100 yards distant took fire, and the fire was communicated to the booth containing the hops; an unextinguishable fire took place, and the hops were totally consumed. The case was first tried at the Dorset Assizes, when the Jury found for the Plaintiff.

On appeal, the case was argued at great length, and the oldest authorities and cases quoted on carriers' law—very interesting, but too long to introduce here. Lord Mansfield said—"The question is whether the common carrier is liable in the case of fire. It appears from all the cases for 100 years back that there are events for which the carrier is liable *independent of his contract*. By the nature of his contract he is liable for all due care and diligence, and for any negligence he is suable on his contract. But there is a further degree of responsibility: by the custom of the realm, that is, by the common law, the carrier is in the nature of an *insurer*. It is laid down that he is liable for every accident except by the act of God or the King's enemies. Now, what is the act of God? I consider it to mean something in opposition to the act of man, for everything is the act of God that happens by His permission, everything by His knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier unless he shows it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests. If an armed force came to rob the carrier of the goods he is liable, and a reason is given in the books, which is a bad one, viz., that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as, for instance, in the riots of 1780. The true reason is for fear it may give room for collusion, and that the master may contrive to be robbed on purpose and share the spoil. In this case it does not appear that the fire arose from the act of some man or other. It certainly did arise from some act of man, for it is expressly stated not to have happened by lightning. The carrier, therefore, in this case is liable, inasmuch as he is liable for inevitable accident. Judgment against carrier.—*Tried in Court of King's Bench, Michaelmas Term*, 1785.—*From Durnford and East's Term Reports, vol.* 1, *page* 34. (In *Smith* v. *Horne*, Justice

Burrough says the doctrine of notice was never known until the case of *Forward* v. *Pittard*. I suppose, therefore, it must have grown out of this case, but certainly I cannot trace any mention of it in the report of the case.)

188. *London and North Western Railway Company* v. *Glyn (Globe Insurance Company).*—Action for £15,000 on a policy of insurance on goods, burnt in A Shed, Camden Station, when said shed was burnt down. The insurance was "on goods their (Company's) own and in trust as carriers therein." The policy was endorsed with conditions.

(No. 1.) "In every case of loss, duly proved, the (Insurance) Company will reinstate the property, or the assured shall receive satisfaction to the amount thereof, without discount or deduction."

(No. 2.) "Goods held in trust, or on commission, are to be insured as such, otherwise the policy will not extend to cover such property."

The Insurance Company contended that they were only liable to the Railway Company to such an extent as the Railway Company were liable to their customers, and no more. It appeared a case of silk was burnt. This was of value over £10, but not having been so declared to the carrier, the Company, under the Carriers' Act, were not liable. The Insurance Company claimed that, consequently, they were not liable to the Railway Company. Justices Erle, Wightman, Crompton, and Hill decided in favour of the Company, quoting the case of *Watson* v. *The Monarch Insurance Company* (25 Law Journal Reports, vol. 25, page 102, Q. B.), decided by Lord Campbell. The Railway Company were held to have insured the whole value of all goods in the warehouse, and not simply the value the owners of the goods might claim from the Company as carriers.—*Tried in Court of Queen's Bench, January* 22, 1859.—*Law Journal Reports, vol.* 28, *page* 188.

189. *Martin* v. *Great Indian Peninsular Railway Company.*—Action for an officer's luggage destroyed by fire while in transit in India on the Great Indian Peninsular Railway, Budnairah to Bombay. The Plaintiff and his lugagge were carried under a contract with the Indian Government for removing troops. A military guard was sent with the train, and one of the conditions of carriage was as follows :—

"If the number of troops is sufficiently large, a special train will be provided, and due notice, of at least six hours, shall be given to the railway authorities of

the train being required. For the baggage of all detachments above forty the Company shall provide the number of suitable waggons stated in the requisition, for which they shall be paid at the rate of 1½ annas (2¼d.) per waggon per mile. The baggage shall remain in charge of a guard provided by the troops, *the Company accepting no responsibility.*"

The Company contended that they were not liable under the contract, that they made no contract with Plaintiff, and that he could not recover. It was admitted that the rule making carriers insurers exists in England as a custom of the realm, and does not extend to India.

Chief Baron Kelly gave Judgment—"It is contended by the Company that though it must on demurrer be taken that the luggage was destroyed by their own gross negligence and wilful default, yet under the proviso set out they are protected from liability. We are of opinion this limitation of responsibility would cover any loss of the baggage in the custody of the guard occurring through the want of due care on the part of the guard; it is not applicable to luggage lost through the mere negligence of the Company. The pleadings suggest a destruction by fire through the Company's negligence. The Company are liable for this loss, and the Judgment must be against them. As to the contract, the Court think that a wrong was done by which the Plaintiff is affected in his property, and for which, therefore, independently of the contract, he has a right to obtain redress." It was thus held—That although the Plaintiff could not sue the Company for non-performance of their duty as carriers, he was entitled to sue for an injury done to his property, through their negligence, whilst the goods were in their custody. Barons Bramwell, Channell, and Pigott concurred.—*Tried in Court of Exchequer, November* 18, 1867. —*From Law Reports, Exchequer, vol.* 3, *page* 9.

190. *Scaife* v. *Farrant.*—Action for furniture contained in a furniture van being burned and destroyed in transit. The Defendant Farrant was carting agent at Torquay for the South Devon Railway Company, and advertised himself as a carrier for removing and carrying goods and furniture for hire. The furniture in question was removed from Paignton to Plymouth, the charge being £22 10s., which was to include risk of breakages in transit, including the use of all necessary mats, cases,

and packing materials, and every expense. Plaintiff, in accepting the offer made for the carriage, signed a printed form as follows :—

"To Mr. Wm. Farrant.—I hereby agree to pay you the sum of £22 10s. for the removal of my furniture and effects from Paignton to Plymouth, you undertaking risk of breakage (if any), not exceeding £5 on any one article."—H. M. Scaife.

During the journey on the railway from Paignton to Plymouth, the van accidentally, and without negligence on the Defendant's part, caught fire, and the furniture and effects were almost entirely consumed.

On the appeal case Justice Lush said—"I agree with the Court below that the letters sent out in this case (between the parties) constitute a special contract, and think that, whether without these letters the Defendant would have been liable or not for the accident which happened to the goods, the terms of the contract sufficiently show that both parties understood that the risk undertaken by the Defendant was of a much more limited character. The fair meaning of the letters is that the Defendant was willing to undertake a particular casualty and no other, and to pay up to £5 for any article damaged by that casualty, and this the Plaintiff must have understood to be the meaning. By that contract both parties are bound. I agree that it does not exclude liability for such damage as might result from want of due and reasonable care in the packing or the carriage of the goods; but the damage was not caused by any such result, but, so far as the Defendant is concerned, was purely accidental. I think, therefore, that the Judgment should be affirmed." The remainder of the Court concurred. Judgment for the carrier.—*Tried in the Court of Exchequer Chamber, July* 7, 1875.—*From Law Reports, Exchequer, vol.* 10, *page* 358.

191. *Chapman* v. *Great Western and also London and North Western Railway Companies.*—Action for value of two packages drapery destroyed accidentally by fire at Wimborne Goods Station, which was burnt down on the morning of the 27th March, 1880. One package was sent from Bristol per Great Western Company, and one from London per London and North Western Company. Plaintiff was a travelling pedlar,

and the packages were consigned "till called for." One arrived at Wimborne on 24th March, and the other on 25th March. Plaintiff called on 22nd March for the goods, before they arrived, and next called on 27th March, after the fire.

The case was first tried at Nisi Prius, when it was agreed for a verdict to pass for Plaintiff, subject to appeal.

On the appeal case, in the Court of Queen's Bench, in delivering Judgment, Lord Chief Justice Cockburn said—"The question of where the liability of the carrier ceases, or rather becomes exchanged for that of an ordinary warehouseman for hire, is sometimes one of considerable nicety, and not easy of solution.

"The case becomes changed when the carrier is ready to deliver, and the delay in the delivery is attributable not to the carrier but to the consignee of the goods. Here again, just as the carrier is entitled to a reasonable time within which to deliver, so the recipient of the goods is entitled to reasonable time to demand and receive delivery. He cannot be expected to be present to receive delivery of goods which arrive in the night time, or of which the arrival is uncertain, as of goods coming by sea or by a goods train, the time of the arrival of which is liable to delay. On the other hand, he cannot for his own convenience, or by his own laches, prolong the heavier liability of the carrier (contrasted with that of warehouseman) beyond a reasonable time. He should know when the goods may be expected to arrive. If he is not otherwise aware of it, it is the business of the consignor to inform him. His ignorance, at all events, where the carrier has no means of communicating with him, which was the case in the present instance, cannot avail him in prolonging the liability of the carrier, *as such*, beyond a reasonable time. When once the consignee is in *morâ* by delaying to take the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman; *he ceases to be liable in cases of accident.* What will amount to reasonable time is sometimes a question of difficulty; but as a question of fact, not of law, as such it must depend on the circumstances of the particular case. It would be in the highest degree unreasonable that the Company, having

agreed to carry the goods "till called for" for the convenience of the owner, should be saddled with a more onerous liability than would otherwise have attached to them. It cannot be supposed that the Company undertook to keep the goods (as carriers) an indefinite time, until it suited the convenience of the Plaintiff to take them away. Plaintiff must put up with his loss as resulting from his own delay in removing the goods." Justices Lush and Manisty concurred. Judgment for Company. —*Tried in Queen's Bench, April* 7, 1880.—*From Clearing House Claims Reports, page* 488.—*Reported in Law Times Reports, vol.* 42, *page* 252.

DAMAGE BY WET.

	Case No.		Case No.
Robinson v. *Dunmore* (1801) ...	192	*Peek* v. *N. S.* (1863)	168
Siordet v. *Hall* (1828)	193	*Lindsay* v. *G. N. of S.* (1872) ...	195
Davis v. *Garrett* (1830)	194	*D'Arc* v. *L. & N. W.* (1874) ...	171
Collard v. *South Eastern* (1861)	206	*Mitchell* v. *L. & Y.* (1875)	196

DIGEST.

In *Robinson* v. *Dunmore* (1801) furniture, conveyed by cart from London into the country, was damaged by wet owing to the smallness of the tarpaulin. The carrier said—"I have plenty of sacks, and I will warrant the goods shall go safe." Justice Chambre held the Defendant liable, saying—"He is not a common carrier by trade, but he has put himself into the position of a common carrier by his particular warranty."

In *Siordet* v. *Hall* (1828) a cargo in a steam vessel was damaged by water, through the pipe of steam boiler bursting in consequence of having been cracked by frost. Held—That this was not an act of God, but negligence in the filling of the boiler with water before the time for heating it, although it was the practice to fill overnight when the vessel started in the morning. Judgment against the carrier.

In *Davis* v. *Garrett* (1830) 114½ tons of lime, in a barge, was being conveyed, Bewley Cliff to Regent's

Canal. The barge deviated from the usual course, and the deviation would appear to have caused delay. A tempest came on and wetted the lime; the barge took fire, and all was lost. It was held that the law implies a duty on the carrier to proceed without unnecessary deviation in the usual course. Judgment against the carrier.

In *Collard* v. *South Eastern* (1861) eight pockets of hops were damaged by wet. The Company paid the estimated loss by wet (£7 14s. 3d.) of 8 lbs. per pocket into Court. Plaintiff proved it took from October 29th to November 10th to thoroughly dry the hops, which, being marked by the Excise, he dare not unpack. During this time the market price fell to the extent of £65. Baron Martin, on appeal, said—"When brought to market (the hops), we find the market price fallen by £65. If that is not a direct, immediate, necessary, and essential consequence of the breach of contract by the Company, I cannot understand what is. Judgment against Company for the £65.

In *Peek* v. *North Staffordshire* (1863) sender wrote to the Company—"Please forward the three cases of marble, not insured, to W. Peek, Esq.; to be called for at Camden Town Station, London." The damage arose from wet and rust from the nails of the packages, which, with the water, had soaked through the cases and discoloured the marble. Lord Westbury, in the House of Lords, held that "it is not competent, by any description of parol evidence, so to interpret the words 'not insured,' as to embody or incorporate the condition itself into the letter, and thereby make it a special contract in writing within the 7th section of the Act of 1854." The Judgment was, consequently, against the Company.

In *Lindsay* v. *Great North of Scotland* (1872) flour was carried at station to station rate under a special contract limiting the Company's liability to "wilful negligence." The flour got wet to the extent of £6 damage. The flour was loaded by sender. The

Company were held not liable under the special contract.

In *D'Arc* v. *London and North Western* (1874) a wax-work figure, in a case, was delayed and damaged by wet. Senders used their own forwarding note, on which was written, "Forward packages at our own risk." Justice Denman held—That such remark as this was not sufficient, as "the delay and consequent damage had not been the probable risk evidently in the contemplation of the sender."

In *Mitchell* v. *Lancashire and Yorkshire* (1875) sixty bags flax were damaged by wet through being stacked on the ground without any timber under them. The Company's advice to consignee gave notice that the Company held the flax, not as carriers, but as warehousemen, at owner's sole risk. Justice Blackburn said—"It seems to me unreasonable to construe the terms of the advice note as meaning that the Company should hold the goods for the benefit of receiving rent for warehousing them, without any liability whatever, except that they must not convert, or sell, or steal them." Judgment against Company.

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192. *Robinson* v. *Dunmore.*—Action for furniture damaged by wet. Plaintiff hired Defendant to cart his furniture from London into the country. Plaintiff complained of the smallness of the tarpaulin, and Defendant replied—"I have plenty of sacks, and I will warrant the goods shall go safe." Plaintiff, however, not having any knowledge of Defendant, sent a porter with the cart to look after the general safety of the property. On the first trial, at Westminster, a verdict was given for Defendant.

Plaintiff appealed, and on the appeal case Justice Chambre said—"The Defendant is not a common carrier by trade, but has put himself into the situation of a common carrier by his particular warranty. As to possession, that seems clearly proved. How is this affected by the presence of the Plaintiff's servant? It has been determined that if a man travel in a stage coach and takes his portmanteau with him, though he has his eye upon the portmanteau yet the carrier is not absolved from his responsi-

bility, but will be liable if the portmanteau be lost. In this case the Plaintiff, for greater caution, sends his servant with the goods, who pays for watching them because he apprehends danger of their being stolen. So the man who travels in a stage has some care of his own property, since it is more for his interest that the property should not be lost than that he should have an action against the carrier. The evidence of the warranty is perfectly clear, for on the Plaintiff making some objection to the smallness of the tarpaulin the Defendant, in order to remove that difficulty, informed him that he had plenty of sacks to cover the goods, and undertook that they should be carried safe." Judgment for Plaintiff.—*Tried in Court of Common Pleas, May* 4, 1801.—*From Bosanquet and Puller's Reports, vol.* 2, *page* 416.

193. *Siordet* v. *Hall.*—Action for damage to a cargo by water escaping through the pipe of a steam boiler in consequence of the pipe having been cracked by frost. Held—That this was not an act of God, but negligence in the captain of the steamer in filling his boiler before the time for heating it, though it was the practice to fill overnight when the vessel started in the morning. Judgment against carrier.—*Tried in Court of Common Pleas, May* 5, 1828.—*From Bingham's Reports, vol.* 4, *page* 607.

194. *Davis* v. *Garrett.*—Action for £100 for damage to 114½ tons lime, conveyed from Bewley Cliff to Regent's Canal by barge. Plaintiff put on board the carrier's barge lime to be conveyed from the Medway to London. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and, the barge taking fire thereby, the whole was lost. Held—That the carrier was liable, and the cause of loss sufficiently proximate to entitle Plaintiff to recover under a declaration alleging the carrier's duty to carry the lime without unnecessary deviation, and averring a loss by unnecessary deviation. The law implies a duty on the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual course. Judgment against

carrier.—*Tried in Court of Common Pleas, Trinity Term*, 1830.—*From Bingham's Reports, vol.* 6, *page* 716.

195. *Lindsay* v. *Great North of Scotland Railway Company.*—Action for £6 for damage by wet to 22 sacks flour, Kittybrewster to Lhanbryde, carried at station to station rates. The Plaintiff contended the damage occurred through wilful negligence, the Company failing to protect the flour from rain during transit. He quoted the Company's consignment note, where it stated—

"The Company are not common carriers of goods carried at station to station rates, and will not be responsible for any loss, damage, or delay, except upon proof that such damage, loss, or delay arose from wilful fault or negligence on the part of the Company's servants."

He contended it must have been wilful negligence if (as proved) these goods were wet when they reached their destination. Had they been properly covered they could not have been so damaged. The Company contended the goods were loaded and unloaded by owner, at whose sole risk they were conveyed by the Company, and, as "wilful negligence" had not been proved, they were not responsible for the damage by rain the flour had received in transit. The Sheriff said—"At common law the Company would be liable, being insurers, but here it was admitted that these goods were carried under a special contract. Then the contract further bears that when the owners desire the common law risk to be borne by the Company, a rate of 20 per cent. higher shall be charged. It is proved that it was under such a contract and such conditions these goods were carried by the Company. The evidence is uncontradicted that the goods were carefully protected when they started, and there is no more evidence on this point except that they were wet when they arrived at their destination. This is not sufficient to impose a liability upon the Railway Company. The Plaintiff selected the lower rate, and is thus in the same position as a person who has chosen not to insure his goods." Verdict for Company.—*Tried in Aberdeen (?) Small Debt Court*, 1872.—*(Date and place not reported.)*

196. *Mitchell* v. *Lancashire and Yorkshire Railway Company.*—Action for £114 for damage to 60 bags flax and tow

at Newchurch Station. On their arrival (26th July, 1873) the Company served consignees (Plaintiffs) with the usual advice note, which informed consignees the goods remained at the station "to your order, and are now held by the Company, not as common carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges." Consignees did not remove the goods, and for want of warehouse room they were stacked in the open air, and covered with a tarpaulin. After some time consignees removed a few of the bales and found the tow not the quality ordered, and so refused to take the remainder; however, after correspondence with senders, consignees, in October, took some more of the bales, when it was found the tow had been damaged by wet. The bales had not been stacked on timber to keep them off the ground, and the tarpaulins were alleged to have been imperfect and an insufficient protection from wet. Consignees then again refused the tow, but the Company, relying on their advice, denied liability; consignees then took the tow and commenced this action. The case was first tried at Liverpool Spring Assizes, 1874, before Justice Denman, where it was practically admitted by the Company that there had been negligence on their part which would render them liable as warehousemen unless they were protected by the advice note. The Jury gave Plaintiff a verdict for £114. The Company appealed, and on the appeal case Justice Blackburn said—"I take it the law is clear that when the Company, as carriers, received the goods they took them with the liability of carriers as insurers. When the goods arrived at their destination the Company complied with their duty when they gave notice, and then they ceased to be carriers and incurred from that time a liability as warehousemen. There are several cases in which the question has been discussed, when the carrier's liability ceased and the other liability began, as in *Bourne* v. *Gatliff* (8 Scott N. R., 604), *Cairns* v. *Robins* (8 Mee. & W., 258, and 10 Law Journal Reports (N. S.), Exch., 452); and I do not know of any case that supports the proposition that, where the owner is in delay in removing the goods, the warehouseman in consequence holds himself discharged from all responsibility. The obligation of the Company was to hold the goods for the owner, and though

the Plaintiffs, under mistake, said they were not the owners, they were entitled, when they found out their mistake, to correct it. It seems to me unreasonable to construe the terms of the advice note as meaning that the Company should hold the goods for the benefit of receiving rent for warehousing them, but without any liability whatever, except that they must not convert, or sell, or steal them; they need not take any care about them."

Justice Field said—"I find in advice note these words, 'At owner's sole risk,' following affirmative words which describe the Company's liability. It is that of holders of goods under the known definition of warehousemen making a warehouseman's charge. Under these circumstances I cannot read these words as freeing the Company from the ordinary liability to take reasonable care." Judgment against Company.—*Tried in Court of Queen's Bench, April* 22, 1875.—*From Law Journal Reports, vol.* 44, *page* 107.

DAMAGE FROM ABSENCE OF PACKING AND INSUFFICIENT PACKING.

Case No.
Barbour v. *South Eastern* (1876) 197

DIGEST.

In *Barbour* v. *South Eastern* (1876) furniture, unpacked and unprotected by either hay-bands or matting, was sent from London to Dover, and was damaged. Baron Cleasby, on appeal, said—"No person is entitled to claim compensation from others for damage occasioned by his neglect to do something which it was his duty to do. Here the goods were delivered in a manifestly unsafe condition, and Plaintiff chose to have them go in the condition they were in." Judgment for carrier.

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197. *Barbour* v. *South Eastern Railway Company.*—Action for £30 14s. 6d. for damage to furniture sent from London to Dover unpacked. Plaintiff applied to the Company for the rate, and inquired if the furniture required to be packed,

which could have been done for from £6 to £8. The rate was quoted, and Plaintiff was written that the furniture should be protected with matting or hay-bands, or something of the kind, to prevent it getting rubbed by the oscillation of the train. In face of this, Plaintiff ordered the Company to cart the furniture from Taylor's repository, where it was stored. At Taylor's, the carter was offered hay-bands to pack the furniture, but he declined to pack it. He loaded it into his van with straw, and it went forward to Dover, and on arrival there was found damaged.

The case was first tried in the Southwark County Court, when the Judge non-suited Plaintiff. Plaintiff then appealed, when Baron Cleasby said—"No person is entitled to claim compensation from others for damage occasioned by his neglect to do something which it was his duty to do. Here the goods were delivered in a manifestly unsafe condition, and, as I have said before, Plaintiff chose to have them go in the condition they were in, and the damage was the consequence." Justice Field concurred. Judgment for Company.—*Tried in Court of Appeal, February* 11, 1876.—*From Law Times Reports, vol.* 34, *page* 67.

Loss by Theft.

(See also under "Declaration of Value.")

	Case No.		Case No.
Latham v. *Rutley* (1823)	198	*Kuverji Tulsidass* v. *G. I. P.* (1878)	199

DIGEST.

In *Latham* v. *Rutley* (1823) a parcel of bank notes was stolen out of a carrier's office in London, the door being left open. The contract proved was to carry and deliver safely (fire and robbery excepted). The carrier was held not liable.

198. *Latham* v. *Rutley.*—Action for the value of a parcel of bank notes to be carried by carrier's waggon, London to Dover. The contract proved was to carry and deliver safely (fire and robbery excepted). The parcel was stolen out of the carrier's office in London, the door being left open. The Jury found

that the contract for the carriage was subject to the exception of fire and robbery, but that the loss was not by robbery within the meaning of that exception, and gave Plaintiff a verdict.

On the appeal Chief Justice Abbott said—"The result of all the cases upon the subject is that if the carrier only limits his responsibility that need not be noticed in pleading, but if a stipulation be made that under certain circumstances he shall not be liable at all that must be stated. Now here it appeared that in either of two events the carrier was not to be responsible at all, and that exception was not stated in the declaration. The Plaintiff would have been non-suited but for the necessity of leaving it to the Jury to say what was the contract. The carrier is therefore entitled to have a non-suit entered now." Judgment in favour of carrrier.—*Tried in Court of King's Bench, June* 4, 1823.—*From Barnewall and Cresswell's Reports, vol.* 2, *page* 20.

199. *Kuverji Tulsidass* v. *Great Indian Peninsular Railway Company.*—Action for the value of goods taken from the Company by robbers. On a reference from the Court of Small Causes, Bombay, it was held that the English common law rule under which common carriers are held liable as insurers of goods against all risks except the acts of God and of the Queen's enemies is not now in force in India, and that in cases not met by the special provisions of the Acts relating to carriers by railway and common carriers the liability of such carriers for loss or damage to goods entrusted to them is that prescribed by sections 151 and 152 of the Indian Contract Act of 1872, as hereafter quoted. The facts of the case were as follows :—The Plaintiff's goods were being carried in a train from Nangaum to Egutpoora. During the journey the train was plundered by robbers, and the Plaintiff's goods were stolen. In an action for the value of the goods, the Chief Judge of the Court of Small Causes, Bombay, prevented the Defendants' attorney from giving evidence to show that the robbers were not the servants of the Company, and that all reasonable precautions had been taken for the safety of the goods, the protection of the train, and the watching of the line; but, treating the Company as insurers against all risks, decreed the suit in favour of the Plaintiff,

referring, however, the following point for the decision of the High Court: "Can the Defendants, as bailees, defined in section 148 of the Indian Contract Act of 1872, rely on the provisions of section 152 of that Act as protecting them from liability in respect of goods carried by them for reward?" Chief Justice Westropp, in delivering the Judgment of the High Court, said—"We are of opinion the Company are entitled to the benefit of section 152 of the Indian Contract Act."

Sec. 151.—"In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed."

Sec. 152.—"The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in sec. 151."

"Consequently, we must set aside the decree for the Plaintiff, and direct a new trial, at which the Company should be permitted to give evidence that the robbers of the Plaintiff's goods were not the servants or agents of the Company, and that the Company, by their servants and agents, took as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of the same bulk, quality, and value."—*Tried in the High Court of Bombay, 7th December*, 1878.—*From Macpherson's Law of Indian Carriers.—Reported in* 3 *High Court Reports (Bombay), page* 109.

Damage by Rats and Mice.

(*See also under* "*Warehouseman.*")

Case No.

White v. *Humphrey* (1847) 200

DIGEST.

In *White* v. *Humphrey* (1847) hops had remained in carrier's warehouse thirteen months, it being intended that the carrier was at some time to carry them, and he did carry them, Maidstone to London. The hops were damaged by mice. Lord Denman, on appeal, held that as the carrier received the hops into his warehouse for the purpose of being carried for hire after-

wards, he was not a gratuitous warehouseman, and was consequently liable for the damage.

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200. *White* v. *Humphrey.*—Action for damage by mice to four tons hops. The hops were placed in the carrier's warehouse at Maidstone, and allowed to remain there *free* for thirteen months; they were then conveyed by barge to London, where the usual freight was collected. It was understood the hops were to be stored free. The carrier pleaded an absence of gross carelessness, and that he was a gratuitous warehouseman. The Judge directed the Jury that the advantage of carrying the hops for hire might be considered as payment for storage, and that the carrier was not a gratuitous warehouseman. Verdict for Plaintiff. On appeal, Lord Denman held that as he received the hops into his warehouse for the purpose of being carried for hire afterwards, he was not a gratuitous warehouseman. Verdict confirmed.—*Tried in the Queen's Bench*, 1847, 11 *Q. B. Reports, page* 43.

MEASURE OF DAMAGES OR MARKET VALUE.

	Case No.
Sedgwick's Treatise, Extract ...	—
Armory v. *Delamirie* (1791) ...	201
Mercer v. *Jones* (1813)	202
Gainsford v. *Carroll* (1824) ...	203
Butler v. *Basing* (1827)	3
Hadley v. *Baxendale* (1854) ...	137
Fletcher v. *Tayleur* (1855) ...	204
Davis v. *L. & N. W.* (1858) ...	160
Smeed v. *Foord* (1859)	205
Collard v. *S. E.* (1861)	206
Rice v. *Baxendale* (1861)	207
Anderson v. *N. E.* (1861)	438
M'Cance v. *L. & N. W.* (1861)	740
O'Hanlon v. *G. W.* (1865) ...	208
Horn v. *Midland* (1872)	255
Hinde v. *Liddell* (1875)	209
Irvine v. *M. G. W.* (1880)	209½

DIGEST.

Sedgwick's Treatise on the Measure of Damages, chapter 13, *page* 424.—"As a general rule, where goods are entrusted to a carrier and they are not delivered according to the contract, the value of the goods, *with interest* thereon from the day when they should have been delivered, is the measure of the damages. But the question at once arises whether that value is to be computed at the place where delivered to the carrier, or at the place

of destination. We have seen it said that in cases of illegal capture and of collision the actual damage sustained at the time and place of the injury fixes the measure of damages; but in regard to carriers it seems to be well settled that the analogy of this rule does not hold good, and that the measure of damages is the value of the goods at the place of destination. This sometimes involves an inquiry into foreign markets, and will generally include the profits of the adventure, but it has been rightly held that nothing less will satisfy the contract. It is the value of the article at the place of delivery that the Plaintiff, relying on the carrier, has lost. It is that value which he would have received if the contract had been performed. If the goods have been transported by the carrier, he is entitled to deduct his freight; but if he do not perform any part of the contract, then the difference between the value of the article at the place of shipment and at the place of delivery furnishes the measure of damages, deducting in this case also the freight or price of the carriage.

"Where the Plaintiff complained, not of non-delivery, but of delay of arrival, and in consequence of the delay it became necessary to remove the goods to another place to sell them, it was considered that the expense of such removal was rightly recoverable (*Black* v. *Baxendale*).

"In *Smith* v. *Griffith* (3 Hill, 333, tried in New York) it was held—'The damages should afford the Plaintiff an adequate indemnity for the loss sustained at *the time the injury happened.* Assuming that there is no defect in the quality of the article, the fair test of its *value*, and consequently of the loss to the owner, is its price at *the time in the market.* The objection to the evidence offered is that it proposes to take into consideration the fluctuations of the market value long *subsequent to the time* when the injury happened, thereby making the measure of damage to depend on the accidental fall of prices at some future period, which might or might not occur, and, if it did, the loss might or

might not have fallen on the Plaintiff, as for aught the Court or Jury could know he may have parted with the property before its depreciation.'"

In *Armory* v. *Delamirie* (1791) a jewel, taken from a setting, was detained, and in respect to the measure of damages, Sir John Pratt, Chief Justice, directed the Jury that unless the Defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did.

In *Mercer* v. *Jones* (1813) Lord Ellenborough said—"In trover the rule is that the Plaintiff is entitled to damages equal to the value of the article converted at the time of the conversion. There is no reason why this rule should not be applied to bills of exchange. The damages, therefore, in this case must be calculated by the amount of the principal and interest due upon the bills of exchange at the time of the demand and refusal to deliver them."

In *Gainsford* v. *Carroll* (1824) 50 bales of bacon, contracted to be sent from Waterford to London, were never sent by seller. The Court held—"That the Plaintiff had his money in his possession, and he might have purchased other bacon of the like quality the very day after the contract was broken, and if he has sustained any loss by neglecting to do so, it is his own fault." The Under-Sheriff ought to have told the Jury that the damages should be calculated according to the price of the bacon at or about the day when the goods ought to have been delivered.

In *Butler* v. *Basing* (1827) Baron Garrow told the Jury —"With regard to the amount of the damages, in case a verdict passes for the Plaintiff, it is right that I should tell you that there is no distinct evidence of the contents of the box; however, I should recommend you not to pare down the amount of damages because the

articles contained in it cannot be distinctly proved. . . . . It must be always impossible to give evidence of the precise contents of (their) boxes and portmanteaus."

In *Hadley* v. *Baxendale* (1854) an iron shaft for a flour mill was delayed five days, Gloucester to Greenwich, and £300 was claimed for profits, the miller having had to buy flour to supply his customers. Baron Alderson said—"When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may, fairly and reasonably considered, either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

In *Fletcher* v. *Tayleur* (1855) Justice Willes said—"It certainly is very desirable that these matters should be based upon certain and intelligible principles, and that the measure of damages for the breach of a contract for the delivery of a chattel should be governed by a similar rule to that which prevails in the case of a breach of a contract for the payment of money. No matter what the amount of inconvenience sustained by the Plaintiff, in the case of non-payment of money the measure of damages is the interest of the money only; and it might be a convenient rule if, as suggested by my Lord, the measure of damages in such a case as this was held, by analogy, to be the average profit made by the use of such a chattel."

In *Davis* v. *London and North Western* (1858) pictures of the Sepoy rebellion and anatomical models in wax were detained at Sheffield from February to July for £1 3s. 6d. carriage, which it was afterwards found had been prepaid at Birmingham. The Company paid £15 into Court, and the Jury gave £4 per week, as the man's exhibition had been stopped. On appeal, Chief Baron Pollock said—"We are all of opinion that

though it cannot be said that the £1 3s. carriage is the measure of damages—as he could have got the goods for £1 3s., which he did not choose to pay—the real damage is nothing more than that. We are certainly not of that opinion; yet we think that, with reference to the nature of the entire case and the amount of the actual damage, the sum of £15 paid into Court is sufficient."

In *Smeed* v. *Foord* (1859) wheat was damaged by wet from thunderstorm. A threshing machine not being sent according to contract was the cause. Lord Chief Justice Campbell—"On the 14th August the wheat might reasonably be expected to be ripe for threshing; the Defendant knew that it was wanted for that purpose. Then was it not in the contemplation of the parties that if it was not delivered at that time damage by rain might ensue to the Plaintiff? I am of opinion the Plaintiff is entitled to recover for the damage by wet. In respect to compensation for the fall of market price of wheat, my opinion is quite different, because it could not have been foreseen by the parties that the market would fall. It was not in the contemplation of the parties at the time they made the contract, and was not the natural consequence of the breach of contract."

In *Collard* v. *South Eastern* (1861) eight pockets of hops were damaged by wet. The Company paid the estimated loss by wet (£7 14s. 3d.) of 8 lbs. per pocket into Court. Plaintiff proved it took from October 29 to November 10 to thoroughly dry the hops, which, being marked by the Excise, he dare not unpack. During this time the market price fell to the extent of £65. Baron Martin, on appeal, said—"When brought to market (the hops), we find the market price fallen by £65. If that is not a direct, immediate, necessary, and essential consequence of the breach of contract by the Company, I cannot understand what is." Judgment against Company for £65.

In *Rice* v. *Baxendale* (1861) a truss of cloth, Leeds to

Maidstone, never reached Maidstone, and consignee, a hawker, was kept at Maidstone from November 30 to December 22, and had no money to get fresh goods, and had to sell a horse to leave the town. The carrier ignored—Loss of sale, £4; travelling expenses, £3; loss of time for horse and cart, £11; and paid into Court £10 13s. 6d., the bare invoice price of the goods at Leeds. Chief Baron Pollock, on appeal, said—"We are of opinion the Plaintiff is entitled to more (than paid into Court.) The only principle that we lay down is that when goods are sent from A to B, and are lost, the party entitled to them is entitled to the value at B. It is clear that the goods are worth more at Maidstone than Leeds. Let the verdict be entered for Plaintiff for £3." (*See also Baron Bramwell's Judgment.*)

In *M'Cance* v. *London and North Western* (1861) horses declared of £10 value had been damaged from defective bottom of truck. The horses really cost £30 to £35 each. Baron Bramwell said—"I think the declaration of value of £10 per horse is part of the contract, and therefore it is open to the Company to set it up as affecting damages. Here is a man attempting to make a claim, to my mind, dishonest and contrary to his engagement, and unhappily, when he comes into the witness-box he is tempted to support it on oath by a statement not true (that declaration of value was not read over to him). He says—'True, I have entered into a contract, but it is unreasonable, and by a little colouring of the case I can make the Railway Company liable.'"

In *Anderson* v. *North Eastern* (1861) a case of traveller's patterns were lost out of cloak room, and it took fifteen days to replace them. The Company was sued as *warehousemen* for £57 for patterns, case, salary, and expenses. Chief Baron Pollock held the Company to be bailees (not exactly warehousemen), responsible for loss to the amount of the value, but there was no undertaking to be answerable beyond the value, except

by special contract. Consequential damages are not recoverable.

In *O'Hanlon* v. *Great Western* (1865) for a few days delay to a package of pilot cloth, £50, the alleged value of the goods, was claimed. The actual price by sender's invoice was £20 10s. 9d. Justice Blackburn, on appeal, said—"The natural and fair measure of damages would be the value of the goods at the destination place at the time at which they ought to have been delivered. If, from the smallness of the place or the scarcity of the particular goods and other things there is no *market price*, the parties have not the means of settling what it would be." Justice Shee said—"The consignee, within a reasonable time after the time at which the goods should have been delivered, is entitled to go and purchase similar goods at the place where the railway company or carrier contracted to deliver."

In *Horn* v. *Midland* (1872) 4,595 pairs of military shoes which should have been delivered on the evening of February 3, but were not delivered until the morning of February 4. The contract time was February 3; hence the contract was broken, and the difference in price between 2s. 9d. and 4s. claimed from the Company. The Company paid £20 into Court, and the Court, on appeal, held that sufficient, as the Company at the time of accepting the goods were not informed of the extent of damage that would accrue by the delay over the 3rd February.

In *Hinde* v. *Liddell* (1875) goods contracted to be supplied were not supplied by Defendant, and Plaintiff had to buy elsewhere at an increased price. It was held that this increased price was fairly recoverable from Defendant owing to his failure to supply the goods according to his contract.

In *Irvine* v. *Midland Great Western* (1880) Plaintiff complained the Company offered him waggons to convey hay which would only carry 30 cwt., whereas he demanded waggons that would carry 4 tons. As the charge was 15s. per waggon, he found, on sending

several tons, that he would suffer a serious loss, which would make his venture profitless. He therefore sold the hay at a loss, and it was not conveyed by railway. He claimed £226 loss. Baron Fitzgerald, on appeal, said the damages proved were not the natural consequences of the acts of the Company; that they had supplied waggons fit to carry the hay, and that the Plaintiff should have used these waggons, and if any greater charge was made than that agreed on, the Plaintiff should have paid it and then sued the Company for the difference; and that he ought not by his acts to create a claim for himself.

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201. *Armory* v. *Delamirie.*—Action for value of a jewel. The Plaintiff, being a chimney-sweep's boy, found a jewel, and carried it to Defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again, whereupon the apprentice delivered him back the socket without the stones. And now, in trover against the master, these points were ruled:—

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action will be against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water, that would fit the socket, would be worth; and the Chief Justice, Sir John Pratt, directed the Jury that unless the Defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did.—*Tried in Court of King's Bench, Hilary Term,* 1791.—*From Sir John Strange's Reports, vol.* 1, *page* 505; *also Smith's Leading Cases, vol.* 1, *page* 357.

202. *Mercer* v. *Jones.*—Action as to how the damages should be calculated in respect to some bills of exchange.

Lord Ellenborough said—"In trover the rule is that the Plaintiff is entitled to damages equal to the value of the article converted at the time of the conversion. There is no reason why this rule should not be applied to bills of exchange. The damages, therefore, in this case must be calculated by the amount of the principal and interest due upon the bills of exchange at the time of the demand and refusal to deliver them."—*Tried in Court of Nisi Prius, December* 20, 1813.—*From Campbell's Reports, vol.* 3, *page* 477.

203. *Gainsford* v. *Carroll.*—Action for the non-performance of a contract to supply 50 bales of bacon, to be sent from Waterford to London.

The Court held—"That the Plaintiff had his money in his possession, and he might have purchased other bacon of the like quality the very day after the contract was broken, and if he has sustained any loss by neglecting to do so it is his own fault. We think that the Under-Sheriff ought to have told the Jury that the damages should be calculated according to the price of the bacon at or about the day when the goods ought to have been delivered."—*Tried in Court of King's Bench, Feb.* 12, 1824.—*From Barnewall and Cresswell's Reports, vol.* 2, *page* 624.

204. *Fletcher* v. *Tayleur.*—In the action *Fletcher* v. *Tayleur* Justice Willes said, in respect to measure of damages —"It certainly is very desirable that these matters should be based upon certain and intelligible principles, and that the measure of damages for the breach of a contract for the delivery of a chattel should be governed by a similar rule to that which prevails in the case of a breach of a contract for the payment of money. No matter what the amount of inconvenience sustained by the Plaintiff, in the case of non-payment of money the measure of damages is the interest of the money only; and it might be a convenient rule if, as suggested by my Lord, the measure of damages in such a case as this was held, by analogy, to be the average profit made by the use of such a chattel."—*Tried in Court of Common Pleas, Nov.*, 2, 1855.—*From Scott's Common Bench Reports, vol.* 17, *page* 27.

205. *Smeed* v. *Foord.*—Action for damage by wet to wheat, arising from a thunderstorm, and owing to the omission of Defendant in supplying a threshing machine, which, if supplied according to contract, the wheat would have been threshed and the damage obviated.

Lord Chief Justice Campbell said, in respect to the measure of damages—"There was an express contract to deliver the threshing engine on 14th August, but it was not delivered till long afterwards. The Defendant led Plaintiff on from time to time to suppose that the engine ordered would be supplied; hence there was no default on the part of Plaintiff in not hiring another engine. The rule in this case is to be taken from the case of *Hadley* v. *Baxendale*, which accords with the Code of Napoleon, with Pothier, and with Chancellor Kent, and which decides that the Plaintiff is entitled to receive as a compensation such damages as are the natural consequences of the breach of contract, or such as may reasonably be supposed to have been in the contemplation of the parties. I do not say how far this rule applies to the circumstances of that case, but it is an abstract rule of law which I agree with. I say that the Plaintiff is entitled to substantial damages; for this is not like the case of a horse intended to run a race, which was sent by railway and was not delivered in time, so that he lost the chance of winning the race; nor like the case of a pig which might have won the prize; nor like the other case, put by Lord Ellenborough, of a man travelling who was delayed on his journey by the coach breaking down, *per quod* he lost his lieutenancy. On the 14th August the wheat might reasonably be expected to be ripe for threshing; the Defendant knew that it was wanted for that purpose. Then was it not in the contemplation of the parties that if it was not delivered at that time damage by rain might ensue to the Plaintiff? I am of opinion Plaintiff is entitled to recover for the damage by wet. In respect to compensation for the fall of the market price of wheat, my opinion is quite different, because it could not have been foreseen by the parties that the markets would fall. It was not in the contemplation of the parties at the time they made the contract, and was not the natural consequence of the breach of contract." Judgment for Plaintiff for £300.—*Tried*

in Court of Queen's Bench, January 31, 1859.—*From Law Journal Reports, vol.* 28, *page* 178.

206. *Collard* v. *South Eastern Railway Company.*—Action for £90 14s. 3d. for damage and fall of market on eight pockets of hops, Pluckley to London. The details of the claim are £7 14s. 3d. for 8 lbs. hops in each pocket damaged by wet, £18 for diminished selling value by depreciation, and £65 for fall in market price from £18 to £9 per cwt. The hops were delivered to the Company on October 20, but consignee did not receive them from the Company until October 29, and then partially stained from lying in a wet truck. It took Plaintiff from October 29 to November 10 to dry the hops fit for sale. The bags are marked by the Excise with the weight, and the hops could not be transferred. For the actual use of a brewer, except the 8 lbs. (estimated) in each pocket, they were as good as ever. The stained condition and evidence of drying made them less saleable. The case was tried at the Maidstone Spring Assizes, and the Jury gave a verdict for the £18 and the £65. The £7 14s. 3d. had already been paid into Court. The Judge granted leave to appeal as to the £65. On the appeal case Baron Martin said—"We are of opinion the rule (to enter verdict for Company) must be discharged. We are to assume that by reason of the contract being broken by the Company these hops could not be brought into the market until a certain day. When brought to market, we find the market price had fallen by an amount of £65. If that is not a direct, immediate, necessary, and essential consequence of the breach of contract by the Company, I cannot understand what is. I think the Jury had a right to assume the Company had notice that the hops were being sent to London to be sold for profit. I think the case of *Smeed* v. *Foord* (28 Law Journal Reports, 178, Q.B.) does not apply to this case. In my judgment the Plaintiff is entitled to these damages as the immediate and direct loss sustained by him upon a breach of contract by the Company."

Baron Channell concurred, and said the case of *Hadley* v. *Baxendale* did not apply to this case. "Here the hops were delivered in a damaged condition, and I agree in the statement that there is no difference between their being delivered in a

damaged condition, for the purpose of this inquiry, and their having been kept in the Company's own premises, as it is precisely the same as if they had been in the Company's possession and not the Plaintiff's." Verdict against Company. —*Tried in Court of Exchequer, May* 24, 1861.—*Hurlstone and Norman's Reports, vol.* 7, *page* 79; *and Law Journal Reports, vol.* 30, *page* 393.

207. *Rice* v. *Baxendale (Pickford & Co.)*—Action for £28 13s. 6d. for value and damages owing to the loss of a truss of cloth, Leeds to Maidstone, as follows:—

	£.	s.	d.
Black union cloth, 45 yards at 3s. 6d.	7	17	6
Blue pilot cloth, 16 yards at 3s. 6d.	2	16	0
Value of the goods at Maidstone, 1s. 6d. per yard, £4 14s. 6d., which is hereby claimed if Plaintiff has no right to the hereinafter mentioned—			
For loss of sale of above	4	0	0
Travelling expenses	3	0	0
Loss of time of Plaintiff's horse and cart from 30th November to 22nd December, 1860, at 10s. per day	11	0	0
	£28	13	6

The Defendants received the truss at Leeds on 27th November, 1860, but it never reached Maidstone. Plaintiff ordered from sender a fresh supply of goods, but being unable to send the money in advance, as done before, the sender refused to re-supply the goods. Plaintiff was a licensed hawker, and waited for the goods at Maidstone with his horse and cart from November 30 to December 22. The price claimed was sender's invoice price. Plaintiffs had to sell a horse at Maidstone to pay their expenses and to get away. The Defendants paid into Court £10 13s. 6d., the invoice price of the goods. The case was first tried in the Sheriff's Court, London. The Judge found—

(1.) That the money paid into Court was equal to the value of the goods when delivered to the Defendants, and that the

Defendants had no notice of what use the Plaintiffs intended to make of the goods at Maidstone or elsewhere.

(2.) That the Plaintiffs could not have procured goods of a like quality or description at Maidstone at the time the goods ought to have been delivered by the Defendants at a price less than £4 14s. 6d. beyond the sum paid into Court.

(3.) That the Plaintiffs, if they had had cash, might have procured another parcel from the manufacturers at the same price, and the damages to the Plaintiffs beyond the invoice price in respect of delay would amount to £3, and no more.

(4.) That the Plaintiffs had, in fact, suffered to the extent of the damages claimed, but it arose from their want of means.

The Judge gave a verdict, by consent, for Defendants, with leave to appeal. He ruled the amounts were not losses either arising naturally from the breach of duty relied upon, or such as the parties at the time the goods were delivered contemplated. On the appeal to Court of Exchequer, Chief Baron Pollock said—"We are of opinion the Plaintiff is entitled to more (than paid into Court). The only principle that we lay down is that when goods are sent from A. to B., and are lost, the party entitled to them is entitled to the value at B. It is clear the goods are worth more at Maidstone than at Leeds. Let the verdict for Plaintiff be entered at £3." Baron Bramwell said—"I agree that the Plaintiff is entitled to the value of the goods to him at the place of consignment, with this qualification—that the value at that place is the sum at which the goods could be got *to* that place, not the value *at* the place; and, strictly speaking, on the finding in this case I think our Judgment should be for the Defendants. It is due to the learned Deputy Judge to say that the case is very carefully stated. He finds that the amount paid into Court was equal to the value of the goods when delivered to the Defendants; and if that is to be taken as the finding of the value at Maidstone, the Defendants, in my opinion, would be entitled to our Judgment; but I think that if the Judge's attention had been called to this particular point, he would have said that the value to the Plaintiff at Maidstone would, in law, be something more than the value at the place of delivery at Leeds. I therefore accede to our Judgment

being for the Appellant." Verdict, £3 for Plaintiff.—*Tried in Court of Exchequer, May* 27, 1861.—*From Law Journal Reports, vol.* 30, *page* 371.

208. *O'Hanlon* v. *Great Western Railway Company.*—Action for £50 for a package of pilot cloth lost in transit, Leeds to Neath. The bale was delivered at Leeds, November 6, 1864, and consignee, a travelling hawker, on application at Neath a few days after, could not get the cloth. His attorney demanded £25, and the action was commenced 21st January following. It appeared Plaintiff paid £20 for the cloth, but the sender's invoice was £20 10s. 9d., the odd money being allowed as discount. The Company paid into Court the even sum of £22 on March 4, made up of (1) £20 10s. 9d.; (2) interest, about 10 per cent., on that sum for four months, £1 7s. 4d.; (3) carriage, 5s. The case was first tried at the Glamorganshire Spring Assizes before Justice Blackburn. The Plaintiff said he could not have bought similar goods in Neath under £25. The Judge left it to the Jury to say the value of the goods at Neath, where they ought to have been delivered, which would be something more than the cost at Leeds (and the carriage, not, however, paid in this case); but he left it to the Jury, as men of sense, how much more, including interest, which might be given up to the 4th March, when the plea was pleaded. The Jury found for £3 over the £22 paid into Court. The Company appealed, and on the appeal case Justice Blackburn said—"The natural and fair measure of damages would be the value of the goods at the destination place at the time at which they ought to have been delivered. If, from the smallness of the place or the scarcity of the particular goods and other things, there is *no market* price, the parties have not the means of settling what it would be. The real value would have to be ascertained, as a matter of fact, by the Jury. I think the Jury, in finding £25 damages, were very liberal in doing so, but I cannot say they were wrong." Justice Mellor concurred. Justice Shee said—"The consignee, within a reasonable time after the time at which the goods should have been delivered, is entitled to go and purchase similar goods at the place where the railway company or carrier contracted to deliver. If the place at which the goods ought to have been delivered is a place

where there is plenty of such commodities, but none except charged with a profit beyond their prime cost and the cost of their carriage, then the damage he sustains is this higher profit cost to him, though this price be more than the price at which the goods would have stood to him if they had been received at the proper place and time." Verdict against Company, damages not being reduced.—*Tried in Court of Queen's Bench, May* 13, 1865.—*From Law Journal Reports, vol.* 34, *page* 154.

209. *Hinde* v. *Liddell.*—Action for breach of contract, illustrating the measure of damages. The Defendant, Liddell, contracted to supply Plaintiff, Hinde, with 2,000 pieces of gray shirtings, to be delivered on the 20th October, at a fixed price, the Defendant being informed that they were for shipment. Shortly before the 20th October, the Defendant informed Plaintiff that he would be unable to complete his contract by the time specified, on which Plaintiff endeavoured to get the shirtings elsewhere ; but there being no market in England for it, that kind of shirtings could only be procured by a previous order to manufacture it. Hinde himself, having made a contract to supply the shirtings, procured 2,000 pieces of a superior quality at an increased price, which his purchaser accepted. Hinde therefore sought to recover against Defendant, for the breach of his contract, the difference he paid for the substituted shirtings and the Defendant's contract price. It was admitted at the trial that the shirtings which the Plaintiff bought were the nearest in price and quality that could be got by the 20th October.

On the first trial, Plaintiff obtained a verdict for £137 10s., which was subsequently affirmed on the appeal case, when Justice Field said—"The Jury gave a verdict for £137 10s., the difference between the contract price and the price that Plaintiff had paid for other shirtings. As soon as the Defendant told Plaintiff that he could not complete his contract, the Plaintiff did the best he could to find cloth of the same description. He was unable to do so, but he did find a number of pieces of another kind which was the nearest approach in kind and quality to be got. The Plaintiff *bonâ fide* paid the increased price, which he did not and could not have recovered

from his vendee. It follows that he was entitled to recover this difference in price as the damages which were the natural consequence of the Defendant's breach of contract, and were what must have been in the contemplation of the parties when they made the contract. It is to be observed that the Defendant was told that the shirtings were for shipment, and even without this the description of the article was such as made it known that it was not for wear in this country, but for export to a foreign merchant. The Defendant not supplying the cloth at the given day, the Plaintiff was entitled to get the best substitute he could. If he had derived any benefit from the advance in price, I should hesitate before I said he could recover the whole of the difference, but he derived no benefit whatever beyond being able to complete his contract with his vendee upon the original terms upon which he had contracted." —*Tried in the Court of Queen's Bench, April* 21, 1875.— *From Law Reports, Queen's Bench, vol.* 10, *page* 265.

209½. *Irvine* v. *Midland Great Western Railway Company.*—This case, which was argued December, 1879, came before the Court for Judgment, January, 1880. It was an action brought by the Plaintiff, residing in the county of Galway, against the Defendants to recover damages, laid at £226, for breach of contract in not carrying a large quantity of hay, the property of the Plaintiff, from Woodlawn to Galway, in the month of March. The Plaintiff, it appeared, had purchased the hay for the purpose of selling it in the town of Galway, and had made an agreement with Defendants to have it carried in large waggons, capable of conveying four tons of hay, at 15s. per waggon, and he sent several tons to the railway station at Woodlawn to be carried to Galway. On its arrival at Woodlawn the Plaintiff found that the waggons which the Defendants had provided were the ordinary covered goods waggons, and would only convey 30 cwt. per waggon, which was not what he intended and supposed they would have supplied, viz., waggons of a very much larger size, and in which he asserted he had seen hay conveyed along the Defendants' line. To send on all the hay by these waggons would have increased the cost of carriage to Galway so much that the Plaintiff would

have lost by his speculation, and he refused to use them, and in the end he was obliged to sell the hay at different places and for much smaller prices than he could have got had he been able to sell in Galway. The case was tried at the last Assizes for the County of Galway. The Defendants pleaded payment of £10 into Court. The trial resulted in a verdict for the Plaintiff for £135, Justice Harrison, who tried the case, reserving certain questions for the decision of the Divisional Court.

Baron Fitzgerald now delivered the Judgment of the Court, holding that the damages proved were not the natural consequences of the acts of the Defendants; that they had supplied waggons fit to carry the hay, and that the Plaintiff should have used these waggons, and if any greater charge was made than that agreed on the Plaintiff should have paid it, and then sued the Defendants for the difference; and that he ought not by his acts to create a claim for himself. The verdict for the Plaintiff must be set aside and entered for Defendants, and the Plaintiff must pay all the costs.—*Tried in Court of Exchequer (Ireland), January* 28, 1880.—*Reported in Irish Reports, vol.* 6, *page* 55.

COMPLETION OF CONTRACT.
DELIVERY OF GOODS.

GENERAL.

(See also "Stoppage in Transitu" where the question of Delivery arises collaterally.)

	Case No.		Case No.
Scott v. *Pettit* (1803)	122	*Rooke* v. *Midland* (1852)	210
Rowe v. *Pickford* (1817)	124	*Giles* v. *Taff Vale* (1853)	211
Allan v. *Gripper* (1832)	126	*Cooper* v. *London and South Western* (1858)	269
Gilbert v. *Dale* (1836)	31		

DIGEST.

In *Scott* v. *Pettit* (1803) Defendant was a "packer" in London, and goods sent to consignee were addressed to the "Bull and Mouth" Inn. There was a standing order for such goods to be thence delivered to Pettit's house. Consignee became an absconding bankrupt, and his assignee (Scott) claimed the value of the goods, which Pettit had delivered to sender. Lord Alvanley held the *transitus* had ended at Pettit's house, and the assignee could recover.

In *Rowe* v. *Pickford* (1817) goods arrived in London from Manchester, and consignee was advised. He became a bankrupt, and did not remove the goods. It was consignee's practice to allow the goods to remain in the carrier's warehouse until he shipped them to the Continent. Sender gave notice to carrier of stoppage *in transitu*. Held by Justice Chambre—That the *transitus* had ended, and the bankrupt's assignee could recover the value of the goods. Thus, constructive delivery had been made and the contract of carriage ended.

In *Allan* v. *Gripper* (1832) oil cake was carried by canal, Twickenham to Hertford, and before Allan (sender) gave

notice of stoppage *in transitu* the cake had been unloaded into the carrier's (Gripper's) warehouse at Hertford on account of Pestall, the consignee. Pestall used the carrier's warehouse as a store for his cake, sometimes for months at a time, and sold the cake from the warehouse. Lord Lyndhurst held that the *transitus* of the cake was at an end when in the warehouse, which amounted to delivery and the ending of the contract of carriage.

In *Rooke* v. *Midland* (1852) the Ambergate Nottingham and Boston Railway, whose station was then five miles from Nottingham, sent some waggons of timber on to the Midland Company's station at Nottingham. The Midland Company refused to accept and deal with the traffic, and refused to give consignee the timber, requiring that it should be sent back to the Ambergate Company's station. Justice Erle gave Judgment against the Company, holding that they could not withhold delivery from consignee.

In *Giles* v. *Taff Vale* (1853) the Company refused to give up certain "quicks" that had been planted to be kept alive at two of their stations. It was not quite clear whether these quicks were held by the Company as carriers, or whether they were the residue of stock left by a contractor who had planted quicks along the line to form hedges. The importance of the case is that it was held that the Company's superintendent (Fisher) was the legal representative of the Company, binding the Company by his acts and his refusal to give up the quicks. (*See case.*)

In *Cooper* v. *London and South Western* (1858) it was held, in the Court of Common Pleas, that a railway company unloading "station to station" goods for delivery for one person can be required to do so or all persons, or it would constitute undue preference

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210. *Rooke* v. *Midland Railway.*—Action in respect to the detention of a quantity of timber, Hull to Nottingham. It appeared the timber in question had been forwarded to Notting-

ham, which is situated on the Midland Railway, and without the consent of that Company. The Midland Company maintained that the timber should have been taken to a station on the Ambergate Nottingham Boston and Eastern Junction Railway Company, situated a distance of five miles from the Defendants' station at Nottingham. Mr. John Ashworth, the manager of the Midland Railway Company at Nottingham, gave notice to the secretary of the Ambergate Line to remove the timber from the station of his Company at Nottingham, which, however, was not done. In the meantime the consignee, a joiner, insisted upon having the timber, and tendered the carriage for same, but the timber was not delivered.

Justice Erle said—"When the goods arrived at Nottingham the Plaintiff was entitled to have the goods delivered to him. He demanded them, and they were refused. This was a conversion, unless the Defendants can justify their refusal. They say—'The goods were brought to our station by the Ambergate Railway Company, an intermediate line which has no right to send such goods to our station,' and they therefore insist that the Ambergate Railway should take them back to the station which belongs to that Company. The Plaintiff clearly has a right to have his goods, though brought by mistake or without right on the Defendants' premises, upon his paying any charges they may have against them in respect of them." Judgment against the Company.—*Tried in the Court of Common Pleas, December* 1, 1852.—*From the Jurist, vol.* 16, *page* 1069.

211. *Giles* v. *Taff Vale Railway Company.*—Action for the value of a quantity of fencing quicks that, to keep alive, had been planted on the Company's ground at Aberaman Station and Navigation Station. It was only the 90,000 quicks at Aberaman Station, valued at £40, that were in dispute; but the Company refused to allow either lot to be removed. It appeared Plaintiff, who was a sub-contractor, had purchased the quicks from Jones, the contractor; and these quicks were said to be an overplus from a large quantity that had been used for fencing the railway. The Company's superintendent believed that the quicks belonged to the Company, and at some

previous time had been paid for by the Company, but, of course, the identification was the difficulty.

Plaintiff obtained a verdict in the Court of Queen's Bench, when appeal was taken to the Exchequer Chamber.

Chief Justice Jervis said—"I am of opinion the Judgment of the Queen's Bench must be affirmed. It seems agreed by us all that if those goods (the Navigation Station lot) were carried by the Defendants, and left with them in the ordinary course of their business as carriers, the demand and refusal from the superintendent on the spot would be sufficient evidence in support of this action (for conversion) against the Company. But it is said because the goods were not in the custody of the Company in the ordinary course (as carriers) there was not sufficient evidence of Fisher's (superintendent's) authority. I am of opinion that it is the duty of the Company carrying on a business to have upon the spot some one with authority to deal on behalf of the Company with all cases arising in the course of their traffic as the exigency of the case may demand; and I think it was a question for the Jury whether Fisher, in this case, was a person having such authority. If he was, I think he had authority in the exigency of the traffic to keep the quicks in the mode in which they were kept, and that, consequently, they were in the custody of the Company in the course of their ordinary business. I am therefore of opinion that it was a case for the Jury, and that there should be no *venire de novo*." The other Judges concurred generally. The Court unanimously held—That it is the duty of a Company carrying on trade to have on the spot an officer with authority to do for the Company all that in the ordinary exigencies of their business might require to be done promptly; that in this respect there is no difference between an ordinary partnership and a corporation; that there was sufficient evidence that Fisher had authority to this extent from the Company; and that it was not necessary to show any authority under seal. Judgment against Company.—*Tried in Court of Exchequer Chamber, Nov.* 10, 1853.—*From Ellis and Blackburn's Reports, vol.* 2, *page* 822.

WHAT CONSTITUTES A TENDER OR DELIVERY OF THE GOODS TO CONSIGNEE—CONSTRUCTIVE DELIVERY.

	Case No.		Case No.
Scott v. *Pettit* (1803)	122	*L. & N. W.* v. *Bartlett* (1861) ...	232
Strong v. *Natally* (1804)	215	*Coventry* v. *Gladstone* (1868) ...	118
Rowe v. *Pickford* (1817)	124	*Pollard* v. *L. & S. W.* (1870) ...	212
Storr v. *Crowley* (1825)	226	*Bradshaw* v. *I. N. W.* (1873) ...	213
Allan v. *Gripper* (1832)	126	*Re M'Laren, ex parte Cooper* (1879)	120

DIGEST.

In *Storr* v. *Crowley* (1825) a legal tender had been made, but it was held to have been revoked by carrier's porter subsequently agreeing to make a second delivery of the goods.

In *London and North Western* v. *Bartlett* (1861) it was held "constructive delivery" had taken place when the carrier had advised consignee of the arrival of the wheat at the railway station, that being the special usage and course of business between the consignee and the carrier, at consignee's written request.

In *Coventry* v. *Gladstone* (1868) linseed shipped from Smyrna to London was mortgaged before arrival. Before the ship arrived consignee became bankrupt, and the mortgagees, on the arrival of the ship, obtained a delivery order for the linseed, and handed it to an officer on board the ship, who promised to deliver to them the linseed when he got it clear. The Court held that this did not amount to a constructive delivery, and sender's right of stoppage *in transitu* remained.

In *Pollard* v. *London and South Western* (1870) consignee's wife accepted the cask of wine, paid charges, and gave the carter a note—"Mr. Pollard has received the wine safely, and requests it may be delivered at the stables," 1,000 yards from Mr. Pollard's house. In unloading the cask the carter's rope gave way, and the cask fell and burst. Justice Hannen told the Jury the contract was to deliver to Mr. Pollard's house, and

Mrs. Pollard waived delivery at that place, to which sender had ordered the cask. Verdict for Company.

In *Bradshaw* v. *I. N. W.* (1873) consignee took away one cart-load of the coal, and refused the remainder because it had been (in the meantime) unloaded in a dirty place. Justice Keogh held that due delivery of the coal had been established.

In *Re M'Laren, ex parte Cooper* (1879) 114 tons of castings were sent by ship from Scotland to London, consigned to M'Laren. Thirty tons had been unloaded when M'Laren, who was in Scotland, telegraphed to stop unloading any more. M'Laren went into liquidation. In the Court of Appeal, Lord Justice Brett held—"Part delivery of a cargo or of the bulk of the goods is not *primâ facie* delivery of the whole," and that the *transitus* of the remainder of the castings had *not* ended; that the fact that M'Laren was a partner in the Scotch firm (senders) made no difference.

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212. *Pollard* v. *London and South Western Railway Company.*—Action for a cask of wine which burst from a fall in unloading from delivery cart. The cask came from Southampton, and the carter took it to the garden gate of consignee's house, 1, Brompton Square. Consignee was out; his wife paid the charges, and gave the carter a note as follows:—"Mr. Pollard has received the wine safely, and requests it may be delivered at the mews (his stables), Turkish Baths, Alfred Place," about 1,000 yards from consignee's house. The carter got 4d. gratuity. There was no ladder with the waggon for unloading heavy goods, and the carter attached a rope to the cask, and fastened it to the cart wheel. The rope got fast; the carter, being in a rage, as a witness said, in consequence of the smallness of the gratuity he had received, gave the cask a kick; the rope gave way, and the cask fell on the ground and burst. Justice Hannen, in summing up, told the Jury—"The contract was to deliver at 1, Brompton Square. Mrs. Pollard waived delivery at that place, to which the Plaintiff had ordered

the cask. It was to be taken elsewhere for Mrs. Pollard's convenience, and in no way had it been suggested that the Company was to have been benefited by the alteration in the place of delivery. Now for the accident which afterwards occurred the Company could only be held liable in one of two ways—either it must have been within the scope of the carman's duty to substitute another place of delivery for that agreed upon by his employers, or it must have been within the scope of his authority to enter into a fresh contract of carriage on behalf of his employers. Although he left the matter to the Jury, he could see no evidence of any authority to the carman either to substitute a place of delivery or to enter into a fresh contract of carriage." Jury found in favour of the Company.—*Tried in Court of Queen's Bench, June* 3, 1870.—*From Law Times Reports, vol.* 22, *page* 551.

213. *Bradshaw* v. *Irish North Western Railway Company.*—Action for £54 for 67 tons smithy coal, Dundalk to Enniskillen. The coal, in 17 waggons, arrived at Enniskillen, and on the 28th June, 1865, consignee was duly advised of the arrival, and requested to unload the waggons and remove the coal. The carriage was paid. Consignee's man, M'Gee, carted away one and a half cart-loads of the coal, and wished the trucks put on a siding next the store of Plaintiff. This was done. Consignee, however, never removed any more of the coal, and, after notice, the Company unloaded the trucks in a dirty place on side of railway, and the coal remained there for several years, until they dwindled away, and the Company ultimately sold the residue for £8, which was placed to consignee's credit. The case was first tried before Justice Morris, Trinity Term, 1872, when a verdict was given against the Company for £54.

The Company appealed, and on the appeal case Judge Keogh said—"Plaintiff admits he was called on to take away the coals, and that on other occasions he had done so. He also admitted that he received the order to remove them. There is no count in trover, so the Plaintiff cannot recover against the Company as common bailees or as warehousemen for injury which the goods might have sustained. The question is—Did

they discharge their duty as common carriers? Did the notice amount to a delivery of goods? Was there no further liability? Their liability ceased the moment they gave notice. The consignee was bound to remove the goods in a reasonable time. This case is the same as *Shepherd* v. *Bristol and Exeter*. Can it be said that in this case consignee had no opportunity to remove the coal? The Plaintiff leaves his goods there after he gets notice." Judgment for Company.—*Tried in Court of Common Pleas (Ireland), April* 30, 1873.—*From Weekly Reporter, vol.* 21, *page* 581.

PLACE WHERE DELIVERY SHOULD BE MADE—HOUSE, WAREHOUSE, OR WHARF.

	Case No.		Case No.
Youl v. *Harbottle* (1791)	235	*Duff* v. *Budd* (1822)	218
Hyde v. *Trent N. Co.* (1793) ...	214	*Quiggan* v. *Duff* (1836)	26
Scott v. *Pettit* (1803)	122	*Cairns v. Robins* (1841)	219
Strong v. *Natally* (1804)	215	*Bourne* v. *Gatliffe* (1844)	220
Bodenham v. Bennett (1817) ...	216	*Fowles* v. *G. W.* (1852)	9
Birkett v. Willan (1819)	217	*Evershed* v. *L. & N. W.* (1877)	328

DIGEST.

In *Youl* v. *Harbottle* (1791) the carrier delivered the goods to the wrong person. Lord Kenyon held—"I agree that when a carrier loses goods by accident, trover (conversion) will not lie against him; but when he delivers them to a third person this species of action may be maintained."

In *Hyde* v. *Trent N. Co.* (1793) eighteen bales of cotton were burned in the Manchester Canal warehouse the same night as unloaded from boat. The Canal Company had accepted at the starting point (Gainsborough) the freight, and also a sum for cartage in Manchester. The Company gave the cartage to a carting agent, and paid him, but denied acceptance of a through contract to deliver beyond their warehouse in Manchester. Chief Justice Lord Kenyon held —That the cotton, when burnt, was in the Company's

hands as common carriers, and not as warehousemen, and that they were responsible for the through delivery to consignee's warehouse.

In *Scott* v. *Pettit* (1803) Defendant was a "packer" in London, and goods sent to consignee were addressed to the "Bull and Mouth" Inn. There was *a standing order for such goods to be thence delivered to Pettit's house.* Lord Alvanley held the *transitus* (delivery) had ended at Pettit's house, and the assignee of the consignee could recover.

In *Strong* v. *Natally* (1804) a quantity of fish sank in a lighter at Plaintiff's wharf, where delivery had been tendered. The condition of carriage was "until the cargo shall be discharged and safely landed." From rough weather the lighterman could not discharge the cargo that afternoon, and he offered to stay and see the cargo landed. Consignee said he need not do so, for he would look to the landing himself. Justice Heath, on appeal, held—"Every party may renounce so much of a contract as is for his own benefit. Now in this case the Plaintiff, by his conduct, has renounced all the benefit which would have accrued to him from the words of the contract upon which he relies."

In *Bodenham* v. *Bennett* (1817) a banker's parcel, containing £347, was lost. Baron Wood held—"The carrier does not merely engage safely to carry and convey, but he also engages safely to deliver." He held the carrier liable for gross negligence.

In *Birkett* v. *Willan* (1819) a box of cochineal, addressed "J. Worthy, Exeter," had been ordered from sender, and obtained from carrier by a swindler. Chief Justice Abbott left it to the Jury if there had been any want of care in the carrier delivering the box to the person who came for it. If a parcel was directed to a person generally, in such a place as Exeter, without specifying his place of abode, the carrier was not bound to carry that parcel to any place, but he would fully discharge his duty by delivering it at his office to any person coming from the person to whom it was directed, or

whom he might reasonably suppose to come from that person. On appeal, however, the same Judge granted a new trial, on the decision of *Bodenham* v. *Bennett* being pressed.

In *Duff* v. *Budd* (1822) a parcel of silk goods had been sent from London to Oxford, addressed to a respectable shopkeeper (who never ordered the goods), by the fraudulent representations of a swindler. The carrier, *whose practice was to deliver the goods to consignee's shops*, delivered this parcel to a stranger who applied for the parcel at the carrier's warehouse. Lord Chief Justice Dallas said—" If this were not negligence there would be an end of carriage for hire, for who would be safe if a carrier might deliver a parcel to a person of whom he is altogether ignorant, and whose residence is unknown to him, when he must have well known the person to whom it was directed, not only by name but by residence? He should at all events have been satisfied whether it was to be delivered to *Mr. Parker* in the *High Street* or not before he gave it to a third person " (named Parker).

In *Quiggan* v. *Duff* (1836) two boxes type arrived at the Bridgewater Duke's Wharf, Liverpool, of which Duff, consignee, was duly advised by notice. Duff objected to the carrier (Kenworthy) delivering his goods from the wharf, and it was established that this was the course of dealing between the two. Chief Baron Abinger held it was a question for a Jury, and there must be a new trial.

In *Cairns* v. *Robins* (1841) two packages of goods were delivered to consignee, and he sent them back to the carrier's warehouse to be taken care of. When required twelve months afterwards they could not be found. Carrier made no charge for warehouse rent, and his notice set forth he would not be responsible for goods left on hand beyond three months. Carrier's servant, in evidence, said the carriage of the goods was a sufficient remuneration for warehouse rent. Baron Alderson held the carrier liable as a warehouseman.

In *Bourne* v. *Gatliffe* (1844) cases of linens from Belfast were landed from a steamer at Fenning's Wharf, London, and the same night the warehouse and goods were destroyed by fire. It was proved that the practice was for such goods to be delivered to consignee's place of business at Ironmonger Lane, City, and that consequently the carrier held the goods as a carrier, and not as a warehouseman. Judgment against carrier.

In *Fowles* v. *Great Western* (1852) a case of glass was broken when being unloaded at Brompton at consignee's door, carried by the Company, Bristol to Paddington. The Company included the cost of delivery in their rate, and appointed a carrier (Sherman) to deliver, Paddington to Brompton. On the receipt note, under the head of "To what Station," the word "Paddington" was written. The address, "Montpelier Row, Brompton," was in pencil. Baron Parke held that the Company's conditions of carriage limited their contract to Paddington Station only, and that the words in pencil were a mere memorandum of the address of the person, and not an alteration of the contract.

In *Evershed* v. *London and North Western* (1877) Lord Justice Brett said—"The Company may receive the goods at the edge of the railway, or they may receive elsewhere, but still they have to receive the goods in all cases in which they carry. During the whole time while they have the goods in their possession for conveyance they are carriers, and they charge as such. Sometimes they do not receive the goods at the edge of the railway, but they receive them at receiving houses, or, as is the case here, at the different places of business of their customers." (This must be equally applicable to delivery.)

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214. *Hyde* v. *The Trent and Mersey Navigation Company.* —Action for value of eighteen bales cotton, burned accidentally in carrier's warehouse in Manchester, having been carried by

canal from Gainsborough. They were burned the same night as unloaded. The carriage for the through journey had been prepaid, and also a sum for cartage of the cotton in Manchester to consignee's warehouse. The cartage was to have been performed by "Hibbert," a former clerk with the Canal Company, but who performed the cartage for his own benefit, the Company simply collecting his charge. The Company contended their contract as carriers had ended on unloading the cotton at the wharf, when they became warehousemen, and as warehousemen they were not responsible for loss by fire.

Chief Justice Lord Kenyon said—"The question is, whether at the time when the accident happened the goods were in the custody of the Canal Company as common carriers; because, if they were, by the strict rules of law the Company are responsible, carriers being insurers in all cases except in two. After unloading a further act was to be done; the goods were to have been taken away in carts, but not by the Company, for though they formerly kept carts, and carried away the goods of their customers to their respective houses for some time past, they had ceased to have any concern with the carts, or to derive any advantage from cartage whatever, the carts themselves, and all the benefit arising from that part of the business, belonging to Hibbert. I am not aware that it has ever been decided that it is the duty of the carrier to deliver such goods at the house of every individual person to whom they may be directed. In this case, however, there is one peculiar circumstance which makes it unnecessary to decide the general question, and that is the charge made by the Canal Company, in one of their bills, for the cartage in Manchester; for that charge the Company undertook to deliver the goods. Therefore, without deciding the general question, I think that the Plaintiffs are entitled to the verdict which they have obtained. On the general point I have great doubts; the leaning of my mind at present is that carriers are not liable to the extent contended for." Justices Ashhurst, Buller, and Grose concurred, but thought, on the general question, a carrier should be held responsible to deliver; but they would not commit themselves to decide that question. Judgment against Company.—*Tried in Court of King's Bench*,

Michaelmas Term, 1793.—*From Durnford and East's Term Reports, vol.* 5, *page* 389.

215. *Strong* v. *Natally.*—Action for value of a cargo of fish, Shetland to London, on a policy of insurance. The policy was "until the cargo shall be discharged and safely landed." The goods were unloaded out of the ship into a lighter, and the lighter was taken to consignee's wharf, on the Thames, in the afternoon, but owing to rough weather it could not be unloaded. The lighterman, finding that he could not land the goods, asked consignee whether he should stay and see the cargo landed. The consignee (Plaintiff) said he need not do so, for that he (the Plaintiff) would look to the landing himself. The lighter, during the night, sank, without any neglect being imputable to anyone. On the first trial, the verdict was for Defendant. On appeal, Justice Heath said—"I think the verdict perfectly right. The Plaintiff, in this case, relies on the words in the policy, 'until they are safely landed.' But every party may renounce so much of a contract as is for his own benefit. Now in this case the Plaintiff, by his conduct, has renounced all the benefit which would have accrued to him from the words of the policy on which he relies. It matters not how the loss happened after the Plaintiff had released the underwriters from that provision in the policy under which they would have otherwise been liable." Chief Justice Sir James Mansfield, Justices Heath and Rooke, concurred.—*Tried in Court of Common Pleas, Easter Term*, 1804.—*From Bosanquet and Puller's New Reports, vol.* 1, *page* 16.

216. *Bodenham* v. *Bennett.*—Action for £347 11s., bank notes, contained in a parcel sent by coach, Hereford to Brecon. Sender paid a halfpenny for carriage and booking. The parcel was entered on the way-bill—"Put in the back seat of the coach." The book-keeper at Brecon took two other parcels out of the front seat of the coach, but did not look for the bank parcel, because the coachman usually carried this parcel in his side pocket. The coach people knew that bank parcels containing Welsh notes were regularly sent. The coachman this day was intoxicated, but not unable to attend to business. The carriers had given their usual notice as to parcels in value over £5.

The Jury found for the Plaintiff, owing to the gross negligence of the carriers' servants.

On appeal, Baron Wood said—"The parcel was delivered at Hereford; it was entered on the way-bill; for anything that appears it gets to Brecon, where it ought to have been delivered. The carrier does not merely engage safely to carry and convey; he also engages safely to deliver. Have they taken care to deliver? Nobody looks for it. The book-keeper saw it down in the way-bill; he knew it was to be delivered at Brecon, but never looks for it—not the least in the world. He says, 'I trusted to the coachman;' he, I suppose, would say, 'I trusted to the book-keeper.' What can be grosser negligence? In all probability the parcel was left in the coach and went forward." Barons Graham and Garrow concurred. Judgment against carrier.—*Tried in Court of Exchequer, May* 7, 1817.—*From Price's Reports, vol.* 4, *page* 31.

217. *Birkett* v. *Willan.*—Action for the value of a box of cochineal (over £5 value), carried by coach, London to Exeter. Some person wrote a letter, signed "J. Worthy," ordering the goods, and the sender, having a customer, Jonathan Worthy, at Exeter, sent the goods, and the box was addressed "J. Worthy, Exeter." It arrived safely on a Saturday, and that evening a man inquired for it at the coach office, and asked the carriage (16s. 6d.), and if he could have the box next day (Sunday). The answer was that parcels were never sent out on a Sunday, but that by sending for it he could have it. He got it the next evening, and it proved to be a fraud. The carrier pleaded his notice as to parcels over £5 value, but sender's knowledge of the notice could not be proved. Chief Justice Abbott told the Jury they should consider if there had been any want of care in the carrier delivering the parcel to the person who came for it. He added, if a parcel was directed to a person generally in such a place as Exeter, without specifying his place of abode, the carrier was not bound to carry that parcel to any place, but he would fully discharge his duty by delivering it at his office to any person coming from the person to whom it was directed, or whom he might reasonably suppose to come from that person; and he left it to the Jury to say

whether, under the circumstances proved, the carrier had reasonable ground for thinking that the man to whom he did deliver the parcel came from the person to whom it was directed. Verdict for carrier.

Plaintiff appealed, and urged that it was a case of gross negligence, quoting the case of *Bodenham* v. *Bennett* (4 Price, 31). The same Judge in a measure admitted this by granting a new trial.—*Tried in Court of King's Bench, February* 4, 1819.—*From Barnewall and Alderson's Reports, vol.* 2, *page* 356.

218. *Duff* v. *Budd.*—Action for £89 for a parcel of silks and other goods, by road carriage, London to Oxford. It appeared a stranger called at sender's warehouse in London and ordered the goods as for, and to be sent to, Mr. James Parker, High Street, Oxford, and gave a reference, which was found to be satisfactory. It appeared to be the carrier's practice to deliver parcels to consignee's address in Oxford. On the morning of the arrival of the parcel at Oxford, the carrier's porter, being in the street, called at Mr. Parker's shop and asked if he expected a parcel from London, and Mr. Parker said not. On the same morning, and during the absence of the porter, a person called at the carrier's office and inquired for the parcel, and said that he had seen Mr. Parker in the early part of the morning, and that he had before received two parcels which were directed for Mr. Parker, to be left at the waggon office "till called for;" and on seeing the package in question he claimed it as his, paid the carriage, and took it away. It appeared two previous parcels, consigned in the name of Parker, this same person had received at the carrier's office. The case was first tried at the Guildhall, before Lord Chief Justice Dallas. The carrier proved the following notice was put up in a conspicuous part of his office, and immediately opposite the entrance door:—

"Take notice, that the proprietors of the public carriages who transact their business at this office will not be answerable for any packages containing cash, bank notes, bills, jewels, plate, or watches, however small the value may be, or for any package of more than £5 value, if lost or damaged, unless the same is specified when delivered into the office."

The Judge left it to the Jury—(1) Whether Plaintiff had

knowledge of the notice in the carrier's office in London? (2) whether the Defendant had been guilty of gross negligence? Jury found a verdict against the carrier.

The carrier appealed, and on the appeal case Lord Chief Justice Dallas said—"The porter at Oxford knew the course adopted at the Defendant's office, and that it was his duty as his servant to deliver the parcel in question where it was directed; but he having to deliver another parcel opposite Mr. Parker's house that morning, he saw Mr. Parker, and told him there was a parcel for him at the office which he would deliver shortly, to which Mr. Parker replied that he expected none, and that he knew nothing of it. Should not the clerk who delivered the parcel in question have at least inquired what authority the person claiming it had to receive it? If this were not negligence there would be an end of carriage for hire, for who would be safe if a carrier might deliver a parcel to a person of whom he is altogether ignorant, and whose residence is unknown to him, when he must have well known the person to whom it was directed, not only by name, but by residence? He should at all events have been satisfied whether it was to be delivered to *Mr. Parker* in the *High Street* or not before he gave it to a third person." Justices Park, Burrough, and Richardson concurred in a Judgment against the carrier.—*Tried in the Court of Exchequer, Hilary Term*, 1822.—*From Moore's Reports, vol.* 6, *page* 469.

219. *Cairns* v. *Robins.*—Action for value of two packages of goods lost out of a carrier's warehouse. The packages were carried by road from Chorley to London, and were duly delivered to consignee, but consignee sent them back to the carrier's warehouse to await his orders. They remained on hand over a year, and when wanted could not be found. The carrier had kept packages before for consignee, and he made no charge for warehouse rent; but his servant, in evidence, said they considered the carriage of the consignee's goods a sufficient remuneration for warehouse rent. The carrier proved handing consignee a bill headed as follows:—

"Any goods or packages that shall have remained three months in the warehouse without being claimed, or on account of the non-payment of the charges thereon, will be sold to defray the carriage and other charges thereon,

or the general lien, as the case may be, together with warehouse rent and expenses."

The case was first tried before Baron Gurney, at the Middlesex Assizes, when a verdict was given against the carrier, on the ground that he held the goods as a warehouseman.

On the appeal case Baron Alderson said—"It appears to me that there was evidence whence the Jury might reasonably find that, in consideration that the parties whose goods were carried would pay a certain sum, the carrier would not only carry them, but would warehouse them for three months, the compensation so paid being a compensation, not only for carrying, but for warehouse rent also. The question is, Was the carrier a gratuitous keeper of these goods, or a keeper of them for a reasonable compensation? It seems to me that there was abundant evidence for the Jury in support of the latter view, and that the Jury have found a right verdict." Chief Baron Lord Abinger and Baron Gurney concurred. Judgment against carrier.—*Tried in Court of Exchequer, May* 4, 1841.—*From Meeson and Welsby's Reports, vol.* 8, *page* 258.

220. *Bourne* v. *Gatliffe.*—Action for £734, value of several cases of linen, Dublin to Belfast and Belfast to London, by long sea steamer. The goods duly arrived in London, and were unloaded on Fenning's Wharf between 11 a.m. and 4 p.m. on 29th August, and that same night the warehouse was burnt down and the goods destroyed. Plaintiff's clerk proved that for several years cases of linen had come from Ireland and had always been delivered to his master's place of business in Ironmonger Lane. No notice of arrival had been given, nor was there much time between the unloading and the fire for either advice or cartage. The case was first tried in Court of Common Pleas, where the Jury gave a verdict for £734 against the carrier. It was held that the unloading and depositing of the goods at Fenning's Wharf did not constitute actual delivery to Plaintiff, nor delivery according to the custom of the port of London; nor that the Plaintiff had notice of arrival; nor that a reasonable time had elapsed within which the Plaintiff might have removed the goods. It was held that the carrier had wharfed the goods safely, and that before a reasonable time had

elapsed for the delivery they were burned, without any negligence on his part. The Plaintiff, then, not being a common carrier, was bound to use only ordinary care.—*Tried in Court of Common Pleas, Court of Exchequer Chamber, and lastly in House of Lords on June 7 and* 10, 1844.—*From Clark and Finnelly's Reports, vol.* 11, *page* 45.

CARRIER'S LIABILITY IN RESPECT OF ADVISING THE ARRIVAL OF GOODS WHEN HE DOES NOT DELIVER TO CONSIGNEE'S PREMISES.

	Case No.		Case No.
Golding v. *Manning* (1773) ...	222	*Wise* v. *Great Western* (1856) ...	752
Stroyan v. *L. S. P. Co.* (1854) ...	221	*Great Northern* v. *Swaffield* (1874)	750

DIGEST.

In *Golding* v. *Manning* (1773) Judge Gould said—"I think that all carriers are bound to give notice of the arrival of goods to the person to whom they are consigned, whether bound to deliver (to consignee's premises) or not."

In *Stroyan* v. *Londonderry Steam Packet Company* (1854) rabbits reached Liverpool November 4, and lay till November 6. The Liverpool County Court Judge held that there is no such duty (advising arrival) incumbent upon the carrier by law, and he was unaware of any law which imposes upon carriers such a liability; and as Plaintiff had not proved it as being a custom to the satisfaction of the Court, he non-suited Plaintiff.

In *Wise* v. *Great Western* (1856) a horse arrived at Windsor from Newbury; it was overlooked, and remained in the horse box until next morning. Chief Baron Pollock held—"The Company to a certain extent may have been blameable, but the sender had sent the horse without any letter intimating he was coming, and without any groom to attend him on the journey. The Company was not liable (under special

contract) for any damage that might be done to the horse while remaining in the station till somebody came for him." By inference, the Company were not considered liable to give advice of the arrival of the horse.

In *Great Northern* v. *Swaffield* (1874) a horse had arrived at Sandy Station; there was no person to receive it, and it was sent to livery, and the owner, on application, refused to pay the livery charge. Chief Baron Kelly, on appeal, said—"The Defendant sent a horse to Sandy by the railway, and as it was not directed to be taken to any particular place, some one on his behalf ought to have been ready to receive the horse and take it away." Here no duty was cast upon the Company by the Judge to give any notice or advice of arrival.

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221. *Stroyan* v. *Londonderry Steam Packet Company.*—Action for £2 12s. 6d. for 35 couples of rabbits, from Londonderry to Liverpool. The rabbits arrived in the steamer "William M'Cormick," in Liverpool, on November 4, and Plaintiff received no notice of the arrival of the rabbits until November 6, when he received both rabbits and notice. The rabbits were then unsaleable, and he refused them. He pleaded the Company were responsible to send him an advice of arrival. The Company pleaded it was not the *custom* to send notices of arrival for fish, fowl, or game. The Judge said that there is no such duty incumbent upon the carrier by law, and he was unaware of any law which imposes upon carriers such a liability; and as Plaintiff had not proved it as being a custom to the satisfaction of the Court, he non-suited Plaintiff.—*Tried at County Court, Liverpool, before Judge Pollock, December*, 1854.

222. *Golding* v. *Manning.*—Action for £29 14s. for damage to a box of silk, Birmingham to London, in 1773, by road carrier. The box was *directed* to Mr. Ireland, Spitalfields, London, but on the arrival in London the address was illegible, but the name of Samuel Ireland (no more) was on the way-bill.

The box remained in the carrier's warehouse for twelve months before being identified and claimed, when the damage as claimed was ascertained. Justice Gould said—"There is no occasion to enter, as has been done at the bar, into the general question of the duty of common carriers, though it is held in *Owen*, 57, that all carriers are bound to deliver as well as to carry the goods. But this case depends upon its own special circumstances. The carriers certainly must be understood to have contracted to carry these goods on the same terms and in the same manner that they carried other people's; and it appears that their general course of trade was to deliver goods at the houses to which they were directed, and that they received a premium and kept a servant for that special purpose. This box came *directed* to their (the carriers') warehouse at Birmingham, and that the direction was afterwards defaced was owing to their own neglect. They had Ireland's name in their way-bill, and might have found him out by their directory. Therefore here is a gross and palpable negligence on the part of the carriers, who, whether bound to deliver or not by the general duty of carriers, had undertaken so to do by their general course of trade; and, indeed, I think that all carriers are bound to give notice of the arrival of goods to the persons to whom they are consigned, whether bound to deliver or not." Justices Blackstone and Nares concurred.—*Tried in the Court of Common Pleas, Trinity Term*, 1773.—*From Blackstone's Reports (Elsley Edition), vol.* 2, *page* 916.

IF A CARRIER DELIVER GOODS TO A WRONG PERSON, HE CAN RECOVER VALUE OF SAME FROM SUCH PERSON.

	Case No.		Case No.
Brown v. *Hodgson* (1811)	223	*Wallis* v. *Dunnell* (1863)	224

DIGEST.

In *Brown* v. *Hodgson* (1811) 17 firkins butter had been delivered in error to the wrong person, who appropriated the butter to his own purpose. Chief Justice Mansfield held that the count for money paid could be sustained, and gave Judgment for the carrier.

In *Wallis* v. *Dunnell* (1863) a servant of Plaintiff's (a carting agent) sold wool fraudulently to Defendant which he should have delivered to the proper consignee. Plaintiff recovered the value from Defendant.

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223. *Brown* v. *Hodgson.*—Action for £55 6s. for 17 firkins butter wrongly delivered, and which Defendant applied to his own purposes. The butter was consigned to *Pen*, and Plaintiff, the carrier, delivered it in error to Hodgson, Defendant. The Plaintiff "declared" for goods sold and delivered and for money paid, and delivered to the Defendant a bill of particulars—"To 17 firkins butter, £55 6s.," not saying for goods sold. The Jury found for Plaintiff.

On appeal, Chief Justice Mansfield said—"At the trial, my attention was not called to the count for money paid, but upon this count I think the action may be sustained. The Plaintiffs pay *Pen* on account of these goods being wrongfully detained by Hodgson. They pay the value to the person (sender) to whom they and *Pen* were bound to pay it; and this, therefore, is not the case of a man officiously, and without reason, paying money for another, and therefore the action may be supported. As to the objection taken respecting the bill of particulars, bills of particulars are not to be construed with all the strictness of declarations; this bill of particulars has no reference to any counts, and it sufficiently expresses to the Defendant that the Plaintiffs' claim arises on account of the butter." Justice Heath concurred.—*Tried in Court of Common Pleas, November* 26, 1811.—*From Taunton's Reports, vol.* 4, *page* 189.

224. *Wallis* v. *Dunnell.*—Action by the agent of the Midland Great Western Railway Company for value of three bales wool received by him to deliver to Harrison, but which his carter in error delivered to Defendant. Plaintiff pleaded that Defendant subsequently wrongly purchased the wool from one of his, Plaintiff's, servants. Defendant pleaded the wool was purchased on the representation of Plaintiff's servant that it was sent to him by a friend in the country to be sold. A non-suit was claimed on the ground that Plaintiff was not the consignee of the wool, which the Judge refused to direct. Verdict for

Plaintiff, with £163 damages.—*Tried before Lord Chief Justice and Special Jury, in Court of Queen's Bench (Ireland), December*, 1863.—*From Irish Clearing House Reports.*

WHETHER THE CARRIER HAS FULLY DONE HIS DUTY IN MAKING DELIVERY IS A QUESTION FOR A JURY.

	Case No.
Evans v. *B. & E.* (1862)	234

WHEN GOODS ARE REFUSED BY CONSIGNEE, THE CARRIER IS NOT BY LAW REQUIRED TO ADVISE THE SENDER OF SUCH REFUSAL.

	Case No.
Hudson v. *Baxendale* (1857)	225

DIGEST.

In *Hudson* v. *Baxendale* (1857) a puncheon of gin was refused by consignee as not having been ordered by him. It lay in the carrier's warehouse for nearly three months, and lost 25 gallons by leakage. Sender was not advised of the refusal of the gin. Baron Bramwell, on appeal, said—"It is said that reasonable conduct inevitably includes that the sender shall be told the consignee refused to accept the goods. I wholly deny that that is so, but I do not say that there might not be cases where it could be collected, from the mode in which the parties have dealt before, that one man may take upon himself such a duty; but to lay down a general abstract proposition that a carrier, when the consignee has refused to receive, is bound to give notice to the sender, seems utterly unfounded."

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225. *Hudson* v. *Baxendale (Pickford & Co.)*—Action for the value of 25 gallons gin that leaked from a puncheon, warehoused after refusal by consignee—London to Brecon. The puncheon was taken by railway to Newport, 30th July, 1854, and then delivered to the Brecon carrier for conveyance by canal. The Brecon carrier signed for the puncheon at New-

port, "Not full, and leaky at the bung." Consignee refused the puncheon on the ground that he had not ordered it. The carrier placed the puncheon in a warehouse, where it remained nearly three months, Plaintiff having no notice that Webb, the consignee, had refused it. Plaintiff's traveller, going to Brecon in October, saw the puncheon in the warehouse, looking damp outside, and 25 gallons short. He arranged with Webb to take the residue. The case was first tried at the London Sittings after Trinity Term, 1857, before the Lord Chief Baron. He held that there was no evidence to go to the Jury in support of any count but the first. He told the Jury the Defendants were responsible for what took place while the puncheon was being conveyed from London to Brecon, but that they were not responsible for the leakage if it occurred after it was placed in the warehouse at Brecon; neither were they responsible if the leakage arose from the original vice in the packing (*i.e.*, bad or insecure cask). After the Defendants had tendered the puncheon to consignee, and the consignee had said "I will not take it," then they were no longer insurers, and their duty as carriers had ceased, and a totally different duty was cast upon them. He said, as to the third count (notice of refusal not having been given), if that was a duty, there was no evidence of any undertaking of the sort alleged; and although a carrier is bound to do what is reasonable, he would not lay it down that it is the duty of a carrier to give notice if the goods are not accepted by the consignee. He left it to the Jury to say—(1) Whether they believed the defect in the cask arose from anything occurring after it was in the Defendants' hands; (2) whether they had been guilty of negligence in the matter subsequent to the refusal by the consignee. The Jury found a verdict for the Defendants. A rule was obtained to set aside the verdict on the ground that it was the Defendants' duty to give notice of the consignee's refusal to receive the goods. The rule was also obtained on the ground of the rejection of evidence tendered to show that it was the practice of carriers to give notice; but it appeared that, on the Chief Baron expressing his opinion that it was not admissible, the evidence was not pressed. On the motion for a rule Baron Bramwell said—"I am inclined to think that when a parcel is tendered for delivery

and refused, it is the duty of the carrier to conduct himself reasonably with respect to it. I do not say that any duty is imposed upon the carrier. I am by no means clear that he would not be warranted in leaving it in a convenient place for the consignee to take. I doubt very much whether the sender has a right to impose the burden on him of taking care of goods because the consignee or sender has not done his duty by them. But assuming that he retains possession of them—and it is to be taken that he does so to secure his lien—he is bound to conduct himself reasonably with respect to them. It is said that reasonable conduct inevitably includes that the sender shall be told the consignee refused to accept them. I wholly deny that that is so, but I do not say that there might not be cases where it could be collected, from the mode in which the parties have dealt before, that one man may take upon himself such a duty; but to lay down a general abstract proposition that a carrier, when the consignee has refused to receive, is bound to give notice to the sender, seems utterly unfounded. There is this difficulty—the sender may not be known. Is he to make an unlimited inquiry? I hold that he is not bound to do so. Then it is said that at all events he is bound to give the notice where it is reasonable that he should. If that is a question of fact, my Lord left it to the Jury, and the Jury decided that it was not reasonable to do so. But then it is said it is a question of law, and the Judge should have told the Jury that it was reasonable to give notice, and he should have told them it was reasonable to do so because a puncheon of gin is of a tempting character, eminently calculated to be preyed upon, and because he knew where the sender was. Well, if that was a question of law, as I own I feel it is (because a question of what is reasonableness or otherwise is for the Judge to determine, and whether the fact be within it or not is for the Jury to determine, because it is a question of fact), to say whether the carrier shall give notice, I am of opinion that in this case it was not the duty of the carrier; and, really, the only ground on which it is suggested to be so is the peculiar nature of the article, namely, that it is one that is exceedingly likely to be preyed upon. But just conceive a marginal note thus: 'Where a carrier receives a parcel of gin,

and the consignee will not take it, inasmuch as it is an article which is very likely to escape it is the duty of the carrier to give notice to the sender.' I hold that that abstract proposition is not a true proposition of law, and I say, if it is a question of law, I hold that there was no evidence here that the carrier ought to have given notice to sender. If it is a question of fact, my Lord left it to the Jury, who found against the Plaintiff. Upon these grounds, therefore, I am of opinion the rule ought to be discharged. It is clear to my mind there was no misdirection; the question of law was rightly decided, and the question of fact was left to the Jury."

Baron Watson said—"I am entirely of the same opinion. It is extremely striking that in the books, both the treatises and the reports, there is not a trace of any such obligation upon a carrier; and, secondly, it is obvious it could not be so, because the law does not apply particularly to large carriers, like Pickford & Co., but is general to all carriers, and relates to all carriers by sea and land. We know there are carriers of parcels going from one town to another; many of them cannot read or write, and a large portion of those who send goods to various consignees are unknown to the carriers, who cannot tell by whom they are sent. In order to make this law it should go to this extent—the carrier should always take a note, which the sender would require to be written, and keep books, and be prepared to give a notice. That would be a serious consequence to carriers. Take those carriers I have referred to, most of whom cannot read or write; many receive parcels to carry from street to street, and why a notice is to be given I cannot understand. It must be a law affecting all carriers, and not only the particular case in question. No doubt there may be a question to leave to the Jury. There may be such cases where it is the duty of the carrier. I do not say it is, but it may be, and if that is so, it must be left for them under the circumstances to decide." Verdict for Defendants.—*Tried in Court of Exchequer, Nov.* 19 *and* 20, 1857.—*Law Journal Reports, vol.* 27, *page* 93, *Ex.*

GOODS TENDERED TO CONSIGNEE AND REFUSED.

	Case No.		Case No.
Storr v. *Crowley* (1825)	226	*Crouch* v. *Great Western* (1858)	384
Hudson v. *Baxendale* (1857) ...	225	*Bradshaw* v. *I. N. W.* (1873) ...	213

DIGEST.

In *Storr* v. *Crowley* (1825) a legal tender had been made, but the goods were brought back because consignee's wife could not pay carriage. Carrier's porter having undertaken to make a second delivery, which was, however, not made, it was held the carrier had "waived all the benefit which might be derived from the previous tender," and he must pay for the lost goods.

In *Hudson* v. *Baxendale* (1857) we have a most important decision for the carrier. When goods are refused, and he is expected by senders to give them notice of same, Baron Bramwell, on appeal, in the Court of Exchequer, held that there was no law requiring a carrier in such a case to advise the sender; the carrier's duty was "to conduct himself reasonably with respect to it;" and "I do not say that there might not be cases where it could be collected, from the mode in which the parties have dealt before, that one carrier may not take upon himself such a duty, but to lay down a general abstract proposition that a carrier is bound to give notice to the sender, seems utterly unfounded." In the same case, the Lord Chief Baron, on the first trial, told the Jury the carrier was not responsible for the leakage to the puncheon of gin, if it occurred after the refusal, and when it had been placed in the carrier's warehouse. After consignee said "I will not take it," the carrier was no longer an insurer, and a totally different duty (warehouseman) was cast upon him.

In *Crouch* v. *Great Western* (1858) a parcel of packed parcels, London to Plymouth, was refused at Plymouth because the Company had charged the carriage 50 per cent. over the ordinary rate; the parcel was next morn-

ing returned to London, and lost. The Jury, on the first trial, under direction of the Judge, found that the tender of the 2s. 3d. (full charge demanded on delivery) to the Company on the day after refusal (but after parcel had been sent back) was made within a reasonable time after the first offer and refusal, and that the package was sent back to London before a reasonable time had elapsed; and, also, that the package ought not to have been sent back to London. This decision was affirmed in Court of Exchequer and Exchequer Chamber; but Baron Bramwell in the first Court, and Justice Crowder in second Court, strongly dissented, and the general opinion of the Court seemed to be that they were bound by the verdict of the Jury.

In *Bradshaw* v. *L. N. W.* (1873) 17 waggon-loads of smithy coal were refused by consignee; he was duly advised of arrival, and took one cart-load away, when, neglecting to remove any more, the Company unloaded the coal. Judge Keogh, on appeal, said—"Did the notice amount to delivery of the goods? Was there no further liability? Their liability ceased the moment they gave notice. The consignee was bound to remove the goods in a reasonable time."

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226. *Storr* v. *Crowley.*—Action for £3, value of a hamper, hams, apples, &c., Windsor to Worcester, in 1825, by canal. Consignee lived half a mile from the canal wharf, and on 3rd May a porter took the hamper to consignee's house. Consignee was from home, and his wife had not the money to pay for the carriage. The porter refused to leave the hamper, and took it away. It appeared the carrier had a claim against consignee for 9s. 2d. for previous carriage alleged to have been unpaid. In the course of the same day a servant maid went to the warehouse with the money, saw the porter, and tendered payment if he would bring the hamper again. He said he could not bring it that evening—the horse had been out all day—perhaps he might bring it next morning, but there would be an additional cartage. Next day consignee's agent and attorney went to the carrier's office requesting the carrier's managing clerk

(Weever) to have the hamper sent home again, offering to pay the carriage and additional porterage. Weever expressed surprise at its having been sent at all, and said it would not have gone if he had known it. Plaintiff owed 9s. 2d., and it should not be delivered till that was paid; he had particular orders to that effect. Consignee himself subsequently called and tendered the carriage for hamper, insisted he had paid the 9s. 2d., but refused to produce the receipt for it, which he had. The hamper was detained. The case was first tried before Justice Littledale at the Worcester Summer Assizes, 1824, when Plaintiff was non-suited. Plaintiff then appealed, when Chief Baron Alexander said—"It appears to me sufficiently proved as a general rule that a carrier, having once tendered a delivery, has discharged himself of his obligation, because otherwise where is his liability to cease? Where is the line to be drawn if not there? But the question is if in this case the rule to be applied is not a different one. The principal must be bound by the acts of his agents. Now, when the porter was applied to on the evening of the day he had carried the hamper to Plaintiff's house, he does not say to the servant—'I have performed my contract;' but he said he could not bring the package that evening because the horse had been out all that day, and was tired, but that perhaps he might bring it in the morning, but there would be an additional cartage. That appears to be the commencement of an undertaking on the part of the carrier to waive all the benefit which might be derived from the previous tender. The clerk, Weever, said—'We will not send the goods unless you pay a sum of money before due,' and to which they were not entitled. These acts amount to an express and direct waiver of the advantages which they might have upon the ground of proffer, and prove that, according to the understanding of the parties (though possibly not according to the general rule of law), there was a continuing contract to find out the person to whom the goods were consigned, and to deliver them. For these reasons I think our Judgment must be against the carrier."

Baron Graham said—"I concur. If the porter who took the goods had told Mrs. Storr (consignee's wife) that she must decline the payment of the carriage at her peril, that he could

not bring the hamper again, and that his master must be paid for warehouse room for them—if he had used any such language as this, I should say then the Plaintiff would not have had any cause of action. It is clear that neither the porter, the clerk, nor the principal had the smallest idea of discharging themselves from their original liability."

Baron Hullock said—"If the carrying were merely fraudulent; if the hamper was taken at a time when the house was empty, or when it was clear there was nobody at home, that act might go for nothing. But it certainly appears to have been a *bonâ fide* carrying. The delivery and the payment of the price are concurrent acts, and the porter had a right to say—'I will not deliver the articles till I am paid the carriage.' If, upon being subsequently applied to, he had said—'I have offered to deliver the hamper to the house once, I am not obliged to do so any more,' there might have been some foundation for the ground taken here to-day." Judgment against carrier for £3.—*Tried in Court of Exchequer, January* 29, 1825.—*From M'Cleland and Younge's Reports, vol.* 1, *page* 129.

WHERE GOODS "UNDER BOND" ARE CONSIGNED TO A CUSTOMS WAREHOUSE, AND LIKEWISE TO A PARTICULAR CONSIGNEE.

	Case No.
Cork Distillery Company v. *G. S. & W.* (1874) ...	227

DIGEST.

In *Cork Distillery Company* v. *Great Southern and Western* (1874) 20 puncheons whisky were consigned to Stein & Co., also to "Customs Warehouse." Stein & Co. got possession of the whisky and never paid the duty, £1,360, and senders were liable for it. Lord Cairns, in House of Lords, held that such a contract could have been made by senders with the Company not to deliver to Stein & Co.; but "to establish such a contract we must be able to find that the position of the Distillery Company was actually and clearly made known to the Railway Company. But there is not a

word that I can find in the special case which states that the Railway Company had such notice; and if they had not such notice, then the case returns into the condition of a case without any special circumstances brought home to the knowledge of the carriers —a case in which there is merely a sender and consignee, and goods delivered to be carried for the consignee, and therefore under his own order with regard to the time and place of delivery."

When goods "under bond" are consigned to a consignee, and likewise to a Customs or Excise warehouse, and the carriage is "to pay," if the consignee neglects to pay the carriage, and the Customs or Excise officers seize the goods for Her Majesty's duty, the carrier loses his lien for his carriage, as Her Majesty's lien takes precedence. We cannot find such a case having been tried, but counsel has expressed this opinion upon a case submitted. The carrier's remedy is to require all goods "under bond" to be prepaid, or to take a guarantee from sender that he will pay the carriage if consignee neglects to do so.

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227. *Cork Distilleries* v. *Great Southern and Western Railway Company.* — Action for £1,360 5s., duty on 20 puncheons of whisky, in several consignments, Cork to Limerick. The whisky was consigned as follows:—"Delivered at the Great Southern and Western Railway Company in good order—Customs Warehouse, Limerick, &c.—1 puncheon of whisky, for John Stein & Co., Limerick Station, Limerick.—Cork Distilleries (Limited)." The receipt note was in this form:—"Cork, 19th day of February, 1869.—From Thomas Henry Hewitt & Co., Watercourse Distillery—1 puncheon of whisky, addressed to Seymour's Customs Warehouse at Limerick, for John Stein & Co." The Company did not deliver any of the puncheons to the Customs warehouse, but Stein & Co. having applied for them at the railway station, the Company delivered the puncheons to them. Stein & Co. never paid the duty, and Plaintiffs, who had a bond for £10,000 with the Excise, were charged with the duty as above. The case was first tried in the

Queen's Bench, Dublin, June, 1870, when a verdict for £1,360 5s. was given for the Plaintiffs. The Company appealed to the Exchequer Chamber, Dublin, January 23 and February 20, 1871, when the previous Judgment was reversed, and a verdict given for the Company. Plaintiffs then appealed to the House of Lords, when Lord Cairns (Lord Chancellor) gave Judgment. He said—"The Cork Distillery Company and Stein & Company appear from the case to have stood in the position of vendors and purchasers. The Company's carriage was to be paid by the purchasers (consignees). If the case ended there, it would be one of the cases of the most ordinary occurrence possible. The property would have passed, the transit of the property would have been at the risk of the purchasers, the purchasers would have been the masters of the contract for conveyance, and it would have been for the purchasers to take delivery either at the place indicated at the time of the departure of the goods or at any other place at which they afterwards preferred to receive the goods. The vendors, however, to obtain the permit necessary for the conveyance of the whisky, gave a bond to the Customs. . . The bond would be given by the Distilleries Company really on behalf of Stein & Co., and Stein & Co. would be responsible to the Distilleries Company if they did anything on their part to frustrate the fulfilment of the condition of that bond. I could quite understand a special contract being made under the circumstances between the Distilleries Company and the Railway Company—that placing upon the whisky a destination to a Customs warehouse was not to be treated as a mere indication of the address of the consignee, but that it must in all cases be taken as of the essence of the contract of conveyance; that it must be understood there was a special engagement that the goods would be carried to that place and to no other place; and that the Company would be liable if any liability should fall upon the senders under their bond. To establish such a contract we must be able to find that the position of the Distilleries Company was actually and clearly made known to the Railway Company. But there is not a word that I can find in the special case which states that the Railway Company had such notice; and if they had not such notice, then the case returns into the con-

dition of a case without any special circumstances brought home to the knowledge of the carriers—a case in which there is merely a sender and a consignee, and goods delivered to be carried for the consignee, and therefore to be under his order with regard to the time and place of delivery. I therefore think the Judgment of the Exchequer Chamber is correct, and therefore the present appeal must be dismissed." Lords Hatherly, O'Hagan, and Coleridge concurred. Verdict for Company.—*Tried in the House of Lords, June* 29 *and* 30, 1874.—*From Law Reports, House of Lords, vol.* 7, *page* 269.

PRODUCTION OF CARRIER'S ADVICE NOTE (ALTHOUGH FRAUDULENTLY OBTAINED) A WARRANT TO CARRIER TO DELIVER THE GOODS.

	Case No.		Case No.
Heugh v. *L. & N. W.* (1870) ...	254	*M'Kean* v. *M'Iver* (1870)	228

DIGEST.

In *Heugh* v. *London and North Western* (1870) a bale was carted and tendered to the consignees (Southwark India Rubber Company), who refused it. The Company had to take it back, and then issued an advice delivery note saying the bale lay at consignees' risk. One of consignees' men got possession of this advice note, and on its production got possession of the bale fraudulently. Chief Baron Kelly, on appeal, said—"It is true, as a matter of law, a delivery to the wrong person by a carrier while he is still clothed with the character of a carrier is held to amount to a conversion. But in this case the character of *carrier* had ceased when the delivery complained of took place, and whatever may have been the character which had devolved upon the Company, it certainly was not the character of carriers." Baron Martin said the Company were involuntary bailees (warehousemen), and nothing else. Judgment for Company.

In *M'Kean* v. *M'Iver* (1870) senders' traveller fraudulently ordered goods for imaginary consignees in

Glasgow. He indorsed the advice notes, and got possession of the goods. The carriers performed every act in the ordinary course of business in Glasgow. Baron Martin held the carrier exempt from liability, saying—"For the purpose of making carriers guilty of conversion of goods there must be something beyond this (the facts that had been proved)—some fault or some wrong—and in my judgment it is a question of fact whether or not their conduct with respect to the delivery of the goods was negligent."

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228. *M'Kean* v. *M'Iver*.—Action for goods alleged to have been wrongly delivered. Plaintiffs, flour and starch merchants, Manchester, employed a traveller named Heddell to get orders in Glasgow. Heddell sent forward orders for goods for F. Cowie & Co., 11, West Nile Street, Glasgow, and Tait & Co., 71, George Street, Glasgow. The goods were forwarded to Liverpool, and shipped by Defendants' steamers for Glasgow. Cowie & Co. were advised on arrival of their goods by advice note. The advice note, purporting to be indorsed in the name of Cowie & Co. (really being indorsed by Heddell), was brought to the Defendants as authority for the delivery of the goods, and the Defendants, according to their usual course of business, on the production of the order delivered the goods to the person named therein. In respect to Tait & Co.'s goods, Defendants delivered them at 71, George Street, acting on similar indorsed notices to those used in the other case. There was, in fact, no such firm as Tait & Co., but Heddell received the goods at 71, George Street, after indorsing the notice in their name. Heddell made away with all the goods.

Baron Martin—"We are of opinion the Defendants are entitled to Judgment. In point of fact it is found that they followed the course of business always pursued by carriers of goods between Liverpool and Glasgow, and delivered the goods at the address indicated. Defendants were misled by fraud, but nevertheless they had a right to assume that there were persons called Tait & Co. at the address to receive the goods. It seems to me that if the Defendants delivered the goods at the address to a person who represented himself to be Tait &

Co., they did all they were really bound to do. I think they obeyed the directions given to them, and they have been guilty of no wrong, because they dealt with these goods in the manner in which they were directed to do. For the purpose of making carriers guilty of conversion of goods there must be something beyond this—some fault or some wrong—and in my judgment it is a question of fact whether or not their conduct with respect to the delivery of the goods was negligent. If they, by reason of the directions given by the consignee, were naturally led to act as they did, I do not think that would be a conversion; nor would the mere fact of the person who received the goods not being Tait & Co., there being no such person there, in my judgment make the carriers responsible as for a conversion." Barons Bramwell and Channell concurred. Judgment for carriers.—*Tried in Court of Exchequer, Nov.* 22, 1870.—*From Law Journal Reports, vol.* 40, *page* 30.

CARRIER CAN DELIVER GOODS TO REAL OWNER THOUGH HE BE NEITHER CONSIGNEE NOR SENDER.

Case No.
Sheridan v. *New Quay Company* (1858) 229

DIGEST.

In *Sheridan* v. *New Quay Company* (1858) a cargo of bark was sent from Donaldson, Dumfries, to Liverpool, and thence to Manchester. Cooper ordered the bark from Donaldson, and sold it to Sheridan. Cooper, not paying Donaldson for the bark, could not get possession of the bill of lading. The New Quay Company (carriers) carried the bark Liverpool to Manchester, as from Buchanan (Cooper's agent) to Sheridan, but the actual delivery was stopped. Justice Willes held that "the law would have protected them (the carriers) against the real owner (Donaldson) if they had delivered the goods in pursuance of their employment, without notice of his claim. It ought equally to protect them against the *pseudo* owner (Sheridan), from whom they could not refuse to receive the goods, in

the present event of the real owner claiming the goods and their being given to him." Donaldson got the bark.

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229. *Sheridan* v. *New Quay Company.*—Action for the value of a cargo of bark, £125 12s. A person named Cooper ordered the bark from G. J. Donaldson, Corsock, Dumfries, and it was shipped in a vessel, the "Mart," for Liverpool, where it duly arrived, and Cooper, writing from Manchester, requested the Defendants (carriers) in Liverpool to look after the "Mart," and let him know when she arrived. Donaldson sent the bill of lading of the bark to the Manchester and Salford Bank, who were not to part with it without receiving the £125. The bank people could not find Cooper at his reputed address or elsewhere, and sent the bill of lading back to Donaldson. The intention on Cooper's part was that Defendants should, as carriers, carry the bark Liverpool to Manchester. Cooper, it seems, transferred the bark to Sheridan (Plaintiff), but it never reached Sheridan's hands. The captain of the "Mart," not receiving his bill of lading, took fright when half of the bark had been unloaded from his vessel and consigned to Sheridan, Manchester. He, however, ultimately consented to send the bark forward, on the written understanding that the delivery of the bark should be stopped in Manchester until the bill of lading indorsed by him had been lodged. Thus it would seem that Buchanan & Co., who acted as agents for Sheridan, sent the bark forward consigned from Buchanan to Sheridan. Cooper, not paying for the bark, could not really effect the transfer of the bill of lading, and ultimately the Defendants delivered the bark to the order of the original sender, Donaldson.

Justice Willes, in giving Judgment, said—"The Defendants were common carriers, and therefore bound to receive the goods for carriage. They could make no inquiry as to ownership. They have not voluntarily raised the question. It was raised by the demand of the real owner before the Defendants had parted with the bark. The law would have protected them against the real owner if they had delivered the goods in pursuance of their employment, without notice of his claim. It ought equally to protect them against the *pseudo*

owner, from whom they could not refuse to receive the goods, in the present event of the real owner claiming the goods and their being given up to him. The compulsory character of the employment of a carrier furnishes ample ground for so holding. We are therefore of opinion that Judgment should be for the carriers." Justices Williams, Crowder, and Byles concurred.—*Tried in Court of Common Pleas, July* 5, 1858.—*From Law Journal Reports, vol.* 28, *page* 58.

WHAT CONSTITUTES PROOF BY CONSIGNEE OF NOT HAVING RECEIVED THE GOODS.

Case No.
Griffiths v. *Lee* (1823) 230

DIGEST.

In *Griffiths* v. *Lee* (1823) Baron Hullock held it sufficient evidence of non-delivery that consignee's shopman denied delivery, and believed it could not have been delivered without his knowledge.

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230. *Griffiths* v. *Lee.*—Action for a parcel, value £10, lost, Shrewsbury to Holywell, by road carrier. Sender proved giving the parcel to carrier's coachman. Consignee's shopman denied delivery, and believed it could not have been delivered without his knowledge. Carrier's defence was his notice as to parcels over £5 value, which notice he advertised in *Chester Chronicle.* Consignee admitted he read that paper, but never observed the notice. Baron Hullock considered the evidence of non-delivery sufficient to call upon the carrier to prove a delivery by his porter or some other witness, because Plaintiff could not be expected to prove a non-delivery better than he had done. As to the proof of notice, that had failed altogether. Judgment with costs, £15, against carrier.—*Tried at Nisi Prius (Shrewsbury Assizes), July* 24, 1823.—*From Carrington and Payne's Reports, vol.* 1, *page* 110.

WHEN THE CONSIGNEE CANNOT BE FOUND THE CARRIER MUST ADVISE THE SENDER.

Case No.
Stephenson v. *Hart* (1828) 231

DIGEST.

In *Stephenson* v. *Hart* (1828) a swindler induced a manufacturer to send him goods, addressed to "J. West, Esq., 27, Great Winchester Street, London." This house had been untenanted twelve months. West, by letter, ordered the goods to St. Albans, to a public-house, where he got them, and disappeared. Justice Burrough, on appeal, said—"At the outset, no doubt, the contract was between the carrier and the consignee, and when it was discovered that no such person as the consignee was to be found in Great Winchester Street, that contract was at an end, and the goods remained in the hands of the carrier as the goods of the sender; a new implied contract arose between the carrier and the sender to take care of the goods for the use of the sender."

231. *Stephenson* v. *Hart.*—Action for £37 17s. 6d., value of a box of combs. A person calling himself J. West called on Plaintiff in Birmingham and purchased the combs, and gave a bill of exchange having two months to run, and ordered the box to be sent to "J. West, Esq., 27, Great Winchester Street, London." The package was duly sent, and the carrier (Defendant), on offering the box at this address, found the house closed, and that it had been untenanted for twelve months, and no person of the name was known about there. About a week or ten days afterwards the carrier received a letter from St. Albans, signed J. West, informing him that a box for him had been addressed by mistake to Great Winchester Street, and requesting him to forward it to the "Pea Hen" Inn at St. Albans. This was done, and the person calling himself West received the box, and shortly after left the inn, where he had been stopping for some days. He was never heard of after-

wards, and when the bill of exchange became due it was found that a fraud had been successfully accomplished. Sender (Plaintiff) claimed to recover from the carrier for wrongful delivery. Lord Tenterden, who first tried the case, left it to the Jury whether the carrier had delivered the box in the due course of his business and duty as a carrier. Jury gave verdict for Plaintiff for amount claimed.

The carrier appealed, and on the appeal case Justice Burrough confirmed the previous verdict, and said—"At the outset, no doubt, the contract was between the carrier and the consignee, and when it was discovered that no such person as the consignee was to be found in Great Winchester Street, that contract was at an end, and the goods remained in the hands of the carrier as the goods of the sender; a new implied contract arose between the carrier and the sender to take care of the goods for the use of the sender. It is clear that the property in them never passed out of the Plaintiff (the sender). The circumstances (untenanted house, &c.) ought to have awakened the suspicions of the carrier, and he was guilty of gross negligence in parting with the goods without further inquiry. In the result they were the goods of the Plaintiff in his possession, and he is liable to him if he deliver them wrongfully." Justice Park concurred. Justice Gaselee dissented, although he held there was gross negligence on the part of the carrier. Judgment against the carrier.—*Tried in Court of Common Pleas, Hilary Term*, 1828.—*From Bingham's Reports, vol.* 4, *page* 476.

CARRIER CAN REFUSE TO DELIVER THE GOODS UNTIL THE CARRIAGE IS PAID BY CONSIGNEE AT TIME OF DELIVERY.

	Case No.
Storr v. *Crowley* (1825)	226

DIGEST.

In *Storr* v. *Crowley* (1825) Baron Hullock said—"The delivery and the payment of the price are concurrent acts, and the porter had a right to say—'I will not deliver the articles till I am paid the carriage.' If,

upon being subsequently applied to, he had said—'I have offered to deliver the hamper to the house once, I am not obliged to do so any more,' there might have been some foundation for the ground taken here to-day."

In respect to Delivery of Part of the Consignment (Breaking Bulk) Constituting a Delivery of the Whole.

Case No.

Bolton v. *Lancashire and Yorkshire* (1866) 116

DIGEST.

In *Bolton* v. *Lancashire and Yorkshire* (1866) Justice Willes said—"There have been questions if a delivery of a part of the goods under a contract puts an end to the stoppage *in transitu*. It has been said that a delivery of a part is a delivery of the whole; but that decision has been dissented from, and it has been said that it is only so when the delivery of the part is in course of delivery of the whole, and the taking possession of that part is then an acceptance of *constructive* possession of the whole."

A Penny Stamp must be Affixed to any Order Transferring Goods from One Consignee to Another. The Absence of such Stamp, however, does not Make the Transfer of the Goods Illegal.

Case No.

Pooley v. *G. E.* (1876) 130

DIGEST.

In *Pooley* v. *G. E.* (1876) a quantity of rails were transferred twice to two different persons, and no stamps were put on the dockets. The transfer advice note could not be accepted in evidence until the penalty under the Stamp Act had been paid. Chief Baron Kelly said — "The Company might have

accepted the delivery order at once, and upon receipt of it they might have taken their chance of being subjected to a penalty under the Act, and have delivered the goods to Davis. The condition with regard to the transfer stamp was one which the Company might have dispensed with at any time, and yet by so doing they would have conferred no right on the Plaintiff."

WHERE CONSIGNEE CONTROLS THE PLACE OF DELIVERY, AND WHERE HE ALTERS, BY SPECIAL ORDER AND USAGE, SENDER'S CONSIGNMENT AS TO PLACE OF DELIVERY.

	Case No.		Case No.
Stephenson v. *Hart* (1828) ...	231	*L. & N. W.* v. *Bartlett* (1861)...	232
Quiggan v. *Duff* (1836)	26	*Cork Distillery Company* v. *G. S. & W.* (1874)...	227
Scothorn v. *S. S.* (1853)	132		

DIGEST.

In *Quiggan* v. *Duff* (1836) two boxes of type had been carried by canal to Liverpool and deposited on the Duke of Bridgewater's Wharf. Duff had given notice to let goods for him remain on the wharf until he sent for them. They could not be found on the sixth day after arrival. Chief Baron Abinger held it ought to have gone to a Jury on the question whether, inasmuch as Duff, by his notices, had in this particular case made the Duke's Wharf his own place of receipt for the goods, he had accepted them, and whether, if so, that was a proper place for leaving the goods so that Duff could take proper care of them.

In *Scothorn* v. *S. S.* (1853) goods were consigned and invoiced from Great Bridge to London for "Scothorn & Co., to the East India Docks, passenger ship 'Melbourne,' Australia." Consignee went to Euston Station, and left with a company's clerk there the railway receipt, across which was written—"Send the boxes, &c., to Scothorn, engineers, Bell Wharf, Ratcliffe, London." The clerk agreed to this. The boxes, how-

ever, were delivered to the "Melbourne," and went to Australia and were lost. Baron Platt held—"If a carrier undertakes to carry goods from one place to another, it is subject to a countermand at any part of the journey, though the owner may be bound to pay for the whole distance."

In *L. & N. W.* v. *Bartlett* (1861) 28 qrs. wheat were sent to Birmingham at S. to S. rate, but sender paid 1s. 6d. per ton extra for its delivery to consignee's mill. Consignee had established a usage that his wheat was to remain at the station. The wheat in question was never delivered to the mill, and was deteriorated and returned to sender (Defendant). Chief Baron Pollock, on appeal, held—"It is quite clear that the consignee of goods may receive at any stage of the journey; and I think if sender directs goods to be delivered at a particular place, it is no contract to deliver the goods at that place and not elsewhere. The contract is to deliver the goods there unless the consignee shall require them to be delivered at some other place." Judgment for carrier.

In *Cork Distillery Company* v. *G. S. & W.* (1874) 20 puns. whisky "under bond," directed to Stein & Co. as consignees, and also to Seymour's Customs Warehouse, Limerick, were delivered to Stein & Co., and not to the Customs. In the absence of advice by sender to the carrier as to the circumstances, the delivery to Stein & Co. was held to have been warranted.

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232. *London and North Western Railway Co.* v. *Bartlett.*—Action for £24 6s. 10d., deterioration of 28 quarters wheat that had remained on hand from 31st December to about 4th March, 1860, at Birmingham, from Brackley. The wheat was invoiced at station to station rate, and sender paid the carriage, and a further sum of 1s. 6d. per ton for delivery at consignee's mill, two miles from Birmingham Station. Consignee was in the habit of leaving grain at Birmingham Station, and objected to its being delivered on arrival unless he gave orders accordingly.

On the 24th May, 1859, consignee wrote the Company as follows :—

"We have sent you instructions several times not to deliver any grain to our mill unless you have received our written order for the same, no matter whether paid, delivered, or not. You have again this morning delivered the lot of Biddle's contrary to these orders. We beg to inform you that we shall in all cases return to the station any wheat delivered in this way from this time."

This order led to a special usage and course of business between consignee and the Company, and consequently, on receipt of the wheat, the Company sent consignee by post an advice of arrival. About the 2nd January consignee sent a man who sampled the wheat, and remarked to the Company's grain porter, "This is rather a roughish lot, John." The Company heard nothing until the 4th March, when Plaintiff (sender) sent a man to sample the wheat, which he pronounced as deteriorated in value 14s. 8d. per quarter. Being unable to sell the wheat in Birmingham satisfactorily, it was sent back to Brackley, and accepted by sender. Plaintiff sued the Company in the Brackley County Court, when the Judge held that the Company had failed to complete their contract to deliver to consignee's mill. The Jury gave Plaintiff a verdict for full amount. The Company appealed, and on the new trial Chief Baron Pollock said—"The Judgment of the Court below was wrong, being founded upon the notion that the carrier was bound to deliver at the mill, notwithstanding the distinct, clear, and positive order that he was not to deliver at the mill. It is quite clear that the consignee of goods may receive at any stage of the journey; and I think if sender directs goods to be delivered at a particular place, it is a contract to deliver the goods at that place and not elsewhere. The contract is to deliver the goods there unless the consignee shall require them to be delivered at some other place." Judgment for Company.—*Tried in Court of Exchequer, November* 18, 1861.—*From Law Journal Reports, vol.* 31, *page* 92.

Whether Delay in Carriage, and what Amount of Delay, Constitutes a Ground for Refusal of the Goods and a Right to Recover the Value from the Carrier.

[(*See also under "Refused Goods."*)

	Case No.		Case No.
Levine v. *Great Western* (1868)	233	*Teats* v. *Newry Steam Packet Company* (1872)	8
Story on Bailments, sec. 582, *p.* 417.			

DIGEST.

In *Levine* v. *Great Western* (1868) a truss of hawker's goods, from Cardiff to Southampton, leaving November 18, had not arrived November 29, when the hawker left the town, and afterwards sued for value of truss. Chief Baron Kelly held that Plaintiff, in point of law, had a right to say to the Company, having waited several days, "I will not now accept them. If you have them here *now*, at this moment, I am ready to take them; but if you have them not here now, I will not accept them; you must keep them yourself and pay me the value."

In *Teats* v. *Newry Steam Packet Company* (1872) a truss was refused by consignee owing to delay. Chief Justice Whiteside said—"Plaintiff's right to sue for damages (supposing the original contract of carriage good) would have depended upon her taking the goods and trying to dispose of them. She might then have brought an action for loss incurred by the delay."

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233. *Levine* v. *Great Western Railway Company.*—Action for £73 6s. for loss of a truss of sailors' pilot coats and other clothes. Plaintiff, a London hawker, sent this truss to Cardiff, but finding he could not sell his goods there, he delivered the truss at Cardiff on November 18 to go to Southampton. He was both sender and consignee, and the truss was consigned "till called for." The clerk at Cardiff said it would take two days to reach Southampton. Plaintiff went to Southampton, and applied for the truss on November 20, and remained there

until 29th November, but it had not arrived. He then left without leaving any address, and told the station-master he would return to London, and the goods would now be useless to him, and he could not take them. The truss did reach Southampton about the 1st or 2nd December. The case was first tried at Westminster before Chief Baron Kelly and a Special Jury. It appeared the Company had paid £5 into Court for the delay, and Plaintiff (probably before the trial came on) accepted the £5. The Company contended that Plaintiff could not, after having accepted the money paid into Court in satisfaction of his claim for damage from delay, throw up the goods and claim their value, thus having two actions for the same goods. The Judge held that Plaintiff, in point of law, had a right to say to the Company, having waited several days, "I will not now accept them. If you have them here *now*, at this moment, I am ready to take them; but if you have them not here now, I will not accept them; you must keep them yourselves and pay me the value." Thereupon it was agreed that the verdict should be entered for Plaintiff for £15, and that the goods should be returned to him, the Company to appeal to the Court of Exchequer on the point raised as to the acceptance of the £5 being a full discharge. On the appeal case Baron Martin said—"The whole question arises on the first count, which is a count not only for damages for unreasonable delay in delivery, but also *for non-delivery of the goods altogether*. If you could have satisfied the Jury at the trial that the Plaintiff had no other cause of action against the Company than in respect of damages for their delay in the delivery of the goods, then the Company would have succeeded. Here there is a cause of action on the first count which was not satisfied by the Plaintiff's acceptance of the money paid into Court." Baron Pigott concurred. Judgment of Court below confirmed against the Company.—*Tried in Court of Exchequer, April* 20, 1868.—*From Law Times Reports, vol.* 18, *page* 295.

CONSIGNEE'S CARTER'S SIGNATURE TAKEN FOR GOODS BEFORE SUCH GOODS HAD BEEN SHOWN TO HIM, OR PUT AT HIS DISPOSAL, OR ACTUALLY DELIVERED.

Case No.
Evans v. *Bristol and Exeter* (1862) 234

DIGEST.

In *Evans* v. *Bristol and Exeter* (1862) consignee's carter went to the station and got several packages of goods. He swore that he had signed the Company's book for the goods before he went to get the goods (in the warehouse), and it did not appear that he checked the packages with the note on putting them into his cart. A box of opium was found missing, and the carter, although he signed for it, swore he did not get it. On appeal, it was held to have been rightly left to the Jury to say whether or not the carter got the box, and the Jury decided he did not get it.

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234. *Evans* v. *Bristol and Exeter Railway Company.*—Action for loss of a chest of opium. This chest was part of a consignment sent from London to Exeter. The Plaintiff, as usual, sent his man with a cart to bring the goods from the railway station. The Company's servants stated that all the goods were brought down to and placed in the cart inside the station, and that the carter received a pass from the proper officer to enable him to leave the station with such goods, and signed a book in which the delivery of all the goods was acknowledged. The man, however, swore that he had signed the book as a matter of form *before he went to get the goods*, and it did not appear that he had examined the list and compared it with the articles in his cart, nor that he had complained at the time that anything was missing. The suggestion on the part of the Company was that he had received all the goods, and that the box of opium had dropped out of the cart or had been otherwise lost on its way to the Plaintiff's premises.

Baron Channell left the question to the Jury, telling them

that they must be satisfied that the goods had been delivered to the Plaintiff's man. They found for the Plaintiff. A rule was obtained to set aside this verdict on the ground of misdirection as to the delivery of the goods, for that the learned Judge should have directed the Jury what would have amounted to a delivery, and that the direction was limited to the question whether the Plaintiff's man had actually received the goods into his possession.

On the appeal case Chief Baron Pollock and Barons Martin and Channell were all of opinion clearly that the question was for the Jury, and had been rightly left to them without any misdirection. Judgment against the Company.—*Tried in the Court of Exchequer, January* 11, 1862.—*From Weekly Reporter, vol.* 10, *page* 359.

DELIVERY OF GOODS "TO ORDER"—LEGAL CONVERSION OF GOODS BY CARRIER OWING TO WRONG DELIVERY.

(*See also* "*Stoppage in Transitu.*")

	Case No.		Case. No
Story on Bailments, sec. 582 ...	—	*Hoare* v. *G. Western* (1877) ...	238
Youl v. *Harbottle* (1791)	235	*Hiort* v. *L. & N. Western* (1877)	239
Laclouch v. *Towle* (1800)	236	*M'Bride* v. *Mid. G. W.* (1877) ...	240
"*The Tigress*" (1863)	107	*Interpleader Act*, 1 *& 2 Will. IV., cap.* 58, *sec.* 1; 23 *& 24 Vic., cap.* 126, *sec.*12, *pages* 157 *and* 158	—
Heugh v. *L. & N. W.* (1870) ...	254		
Carr v. *L. & N. Western* (1874)	237		
Pooley v. *G. E.* (1876)	130		

In these actions I must refer the reader to the full abstract of the cases, as no deductions can be drawn without repeating nearly the whole facts of each case.

Story on Bailments, sec. 582.—"Where a common carrier has been guilty of negligence, whereby the owner of the goods has sustained an injury, the subsequent acceptance of the goods by the owner is no bar to an action for such injury, for nothing short of a release or satisfaction constitutes such a bar. But it may be given in evidence in mitigation of damages, so as to limit the amount to the actual loss sustained by the owner."

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235. *Youl* v. *Harbottle.*—Action for value of goods delivered to wrong person—London to Gravesend. An unknown person applied for the goods from the steam packet carrier at

Gravesend, and he delivered them in error. Lord Kenyon said—"I agree that when a carrier loses goods by accident trover (conversion) will not lie against him; but when he delivers them to a third person, and is an actor, though under a mistake, this species of action may be maintained." Judgment against the carrier.—*Tried at Nisi Prius, at Westminster, June* 7, 1791. —*From Peake's Nisi Prius Cases, page* 68.

236. *Laclouch* v. *Towle.*—Action against a carrier for a consignment of goods delivered to him to be carried from Maidstone to London. While the goods lay at his warehouse a person came there who said the goods were his, and claimed them from the carrier. The carrier said he could not deliver them, but that if he was indemnified he would keep them, and not deliver them according to order. An indemnity was given, and the goods not being delivered according to order, the party by whom they were delivered to the carrier brought an action against the carrier. Mr. Justice Gould, at Maidstone, would not permit him (carrier) to set up any question of property out of the Plaintiff, and held that he, having received them from him (Plaintiff), was precluded from questioning his title or showing a property in any other person. Lord Kenyon admitted the authority of this case cited as law.—*Tried at Nisi Prius, February* 21, 1800.—*From Espinasse's Reports, vol.* 3, *page* 115.

237. *Carr* v. *London and North Western Railway Company.*—Action for £70, value of 15 casks bleaching powder, B 16/30, advised by the Company, but really never received by them. It appeared there were two consignments of bleaching powder loaded on 5th July by the Bridgewater Smelting Company in their siding at St. Helens—(1) 14 casks B 1/14; (2) 15 casks B 1/15. The practice was for the Smelting Company to give the Railway Company a consignment note of what they loaded, and the Railway Company signed for same, with remark "Not seen," and invoiced the goods to the destination station. The consignment note for the two lots gave in mistake the numbers of the 15 casks as B 16/30. There was really a third lot of 15 casks that were to be loaded and delivered to the Company marked B 16/30. On the 7th July the Smelting

Company's clerk, finding he had the 15 casks marked B 16/30 on hand, discovered his mistake in the note, and took to the Railway Company's St. Helens office a corrected consignment note. Previous to this the two lots of casks had been invoiced to Wapping Station, Liverpool, consigned to Carr's (Plaintiff's) "order," and an advice note from Wapping had been sent to Carr. On the discovery of the mistake of the numbers St. Helens advised Wapping, and Wapping sent Carr an advice note of the 15 casks B 1/15, instead of sending him a corrected advice of the two lots of 14 and 15 casks. The only indication that the second advice note was a corrected one and referred to the first one was the remark "Originally entered per our invoice 10 $\frac{6}{14}$, 7th July, 1873." Seeing that consignee was to receive three lots of casks—B 1/14, B 1/15, and B 16/30—he considered the Company had advised him of the three lots being held to his order. The Smelting Company in August actually sent their account for the three lots, and were paid by acceptance. On the 26th August Plaintiff presented the two advice notes at the Company's office, and paid the warehouse charge on three lots of casks, and expected to get delivery of three lots. He only got the two lots B 1/14 and B 1/15, and the lot B 16/30 could not be found, and then the mistake was discovered. Plaintiff thereupon desired that if no such casks had been delivered for him to the Company none such should then be accepted by them on his account. The person to whom Carr had sold the 15 casks B 16/30 bought 15 other casks at £70, or £5 over the value of the missing casks. Plaintiff's action was for the value of the 15 casks and damages to him on a count in trover, and, secondly, on a count alleging a bailment to the Company upon an undertaking by them to deliver to the Plaintiff's order (advice note) on demand. The case was first tried in the Court of Passage, Liverpool, when the Assessor directed a verdict for the Company, but found, on a question put to them, "that the Company knew of the mistake on the 9th July, and that there was no sufficient intimation by the Company to Carr of the mistake." They founded this answer upon the fact that the corrected advice note was not on paper of the same colour (query special form of corrected advice). Plaintiff appealed to the Court of Common Pleas, and contended

in substance that the Company by the advice notes had negligently misled him, and were "estopped" or legally precluded from pleading they never had the 15 casks to deliver. [The legal term is *estoppel in pais.*] It appears there are four kinds of *estoppel in pais*—

"1. If a person, by words or conduct, *wilfully* endeavours to cause another to believe in a certain state of things which such person knows to be false, and if the other believes in such state of things and acts upon his belief, he who knowingly made the false statement is estopped legally from averring afterwards that such a state of things did not exist.

"2. If a person, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, such person is legally estopped from denying the existence of such a state of facts.

"3. If a person, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that he was intended to act upon it in a particular way, and if he, with such belief, does act in that way to his damage, such person is legally estopped from denying that the facts were as represented.

"4. If in the transaction itself which is in dispute A. has led B. into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led B. to act by mistake upon such belief to his prejudice, A. cannot be heard afterwards as against B. to show that the state of facts referred to did not exist."

On the appeal case Justice Brett said—"We are of opinion the Plaintiff has failed to make out that the Company were estopped, and are of opinion the Judgment was properly entered for the Company. It cannot, as it seems to us, be truly affirmed that the Defendants intended any representation of theirs to be acted upon by the Plaintiff in the way of re-selling the goods; there is no evidence of a custom to re-sell *upon the faith of such an advice note as a Railway Company* sends to a consignee. The only intention on the part of the Company which can be properly inferred from the sending of an advice note is that the consignee should send for the goods. If the first intention could be inferred, the Plaintiff did not in re-selling act upon any representation of the Company's, for he re-sold before they made any communication to him; in re-selling he neither acted upon nor was

damaged by reason of any representation of theirs. And if the second intention be inferred, the Plaintiff did not act upon it by sending for the goods; he never did send for them. And if it can be said that by means of the person to whom he sold he sent for them, he suffered no damage by reason of sending for them. Any damage which he suffered was by reason of the re-sale. Neither the payment of the warehouse rent nor of the invoice price can be relied upon as damage resulting from the conduct relied upon to support an estoppel, because either damage can be rectified without the intervention of such an estoppel. There is no consideration for either payment; both were paid under a mistake of facts." Judgment for Company. —*Tried in Court of Common Pleas, November* 25, 1874, *and January* 20, 1875.—*From Law Journal Reports, vol.* 44, *page* 109.

238. *Hoare* v. *Great Western Railway Company.*—Action for 60 sacks pollard delivered to a wrong consignee—Thatcham to Pewsey. The sacks were intended to be sent to the order of James Farmer, but by mistake were misdirected to the order of Thomas Jeeves. On arrival, Jeeves refused the pollard, and one Jarvis applying for 60 sacks pollard, the station-master, seeing the names were very similar, delivered to Jarvis. The 60 sacks were part of 140 sacks pollard sold by Hoare to Farmer; the other 80 sacks had been safely delivered to Farmer at Swindon. The Company maintained that the delivery of the 80 sacks passed the property in the whole 140 sacks to Farmer, and that Hoare could not recover, as no contract existed between him and the Company, he delivering the pollard as agent for Farmer, the buyer. The Company contended there was no evidence of a breach of duty on their part as involuntary bailees. They were merely bound to act with reasonable care and caution. The consignment note contained the following printed condition:—

"*Consignment of Goods to be carried at Owner's Risk.*—The Great Western Railway hereby give notice that they have two rates for the conveyance of certain articles—one the ordinary rate, when they undertake the ordinary liability of the carrier; the other a reduced rate, adopted when the sender relieves them from all liability of loss, damage, or delay, except upon proof that such loss, damage, or delay arose *from wilful misconduct* on the part of the Company's servants.

"To the Great Western Railway Company.—Receive and forward the undermentioned goods, to be carried at the reduced rate below the Company's ordinary rate, in consideration whereof I undertake to relieve the Great Western Railway Company, &c., from all liability in case of loss, damage, or delay (except as above). . . I also agree to the conditions and regulations on the back of this note.—Signature of sender or his representative—JOHN FARMER. Consignee—Mr. JEEVES, Pewsey. Who pays carriage—Mr. JEEVES."

Thus Plaintiff (Hoare), who sold the pollard to Farmer, does not appear at all in the contract of carriage, which was made in the name of Farmer.

The case was first tried in the Wiltshire County Court, where the Judge decided for Plaintiff. The Company appealed, and Lord Chief Justice Coleridge, in giving Judgment, said—"I am of opinion the Judgment below should be affirmed. First, is the proper person made the Plaintiff? The old principle relating to the passing of property on a sale was that, where chattels were ascertained and delivered by the vendor (Hoare) to an agent (the Company) on behalf of the purchaser (Farmer), the vendor was the proper person to bring the action. The rule does not apply in this case. Here the delivery to Jarvis was made under a mistake, and, in addition to that, was a wrongful act. Here there was, in fact, no real consignee, but the property remained in the vendor, and he is, therefore, the proper person to maintain the action. If the station-master had made an application to the sending station, and yet had allowed the goods simply to remain on the premises until they became damaged, I think he would have been merely guilty of negligence. But he deliberately gave up the goods to the wrong person without making any inquiry, and that amounts to 'wilful misconduct,' and it is not the less wilful misconduct because it is also gross negligence. On that ground I hold the Company liable. It is unnecessary to decide the other points which have been raised." Justice Lindley said—"Under the circumstances of the misdirection of the goods, I think the Company did become involuntary bailees of them when they arrived, and that the contract did not come to an end when the goods reached Pewsey. There are many cases in which wilful misconduct and gross negligence correspond. Here there was wilful misconduct. The line is hard to draw between the two,

but there is no necessity that there should be a criminal intention before a case of wilful misconduct can be made out" Judgment against Company.—*Tried in Common Pleas Division, May* 4, 1877.—*From Law Times Reports, vol.* 37, *page* 186.

239. *Hiort* v. *London and North Western Railway Company.*—Action for £230 5s. 4d., for several consignments of oats and grain, Hull to Birmingham, wrongly delivered.

The oats were consigned to the "order" of "Hiort & Brockner," senders. Senders had an agent (George Grimmett) who sold grain for them in Birmingham, but they declined, at the written request of the Company, to give a standing order to deliver their grain to Grimmett—their object being to control the credit given to different customers. It appeared, from Grimmett being so well-known, the Company had in many cases delivered the grain on Grimmett's own order, and in some cases on Grimmett's word, in anticipation of the order arriving from Hull. When Grimmett sold a consignment he reported the sale to Hiort & Brockner at Hull, and they forwarded purchaser the invoice, and sent the order for delivery sometimes to the purchaser and sometimes to the Company direct. Senders found their agent had been fraudulently obtaining grain from the Company. On the 19th November, 1872, the Company, on Grimmett's order, delivered 50 quarters oats to Jno. Sheldon, and, on 22nd November, 1872, the other 10 quarters to W. J. Reeve. On the 24th November the Company received the senders' orders to deliver the 60 quarters to George Tarply, but Tarply had indorsed the order for delivery to Grimmett. Grimmett, however, had previously caused delivery of the oats to Sheldon and Reeve. Tarply was debited in senders' books with the value, £79 3s. 1d., but it appeared the money was not collectable from him. There were two other similar cases where different names occurred. Plaintiffs (senders) maintained that Grimmett made sales to persons in his own employ, and in some instances made fictitious sales. Plaintiffs pleaded "conversion" on the part of the Company wrongly delivering the grain. The Company admitted a pre-delivery on Grimmett's order, but contended that Plaintiffs sold the grain

to Tarply, debited him in their books, and gave him a "delivery order," and he (Tarply) acted upon it by giving another "delivery order" to Grimmett. Thus Tarply assigns to Grimmett, and Grimmett assigns to Sheldon and Reeve, to whom the Company had really made delivery.

Chief Baron Kelly said—"The Company have been guilty of no fraud and of no negligence. On the 19th November and 22nd November the two lots of 50 quarters and 10 quarters were misdelivered by the Company—that is, they were delivered to Grimmett upon some order or the other, or some apparent authority which he produced, but not upon any real authority, or any real or effective order. If Plaintiffs had thought fit to bring an action within two days, and it could have been prosecuted to Judgment in that time, they might have recovered from the Company the value of the misdelivered grain. But on the 23rd November the circumstances totally changed the rights and relations of the parties; for Plaintiffs sold the 60 quarters to Tarply and granted him a delivery order; that delivery order has not been revoked, supposing that it were revocable. Senders sold the grain to Tarply on credit, and debited him with the amount in their books. Tarply was then entitled to the oats. Tarply then duly indorsed and assigned the oats to Grimmett, and Grimmett succeeded to his right in the oats. If at this time the oats had been at the station, and Plaintiffs had demanded them, and Grimmett had come with the delivery order indorsed by Tarply and also demanded them, there can be no doubt in the world that it would have been Grimmett who would have been entitled to the oats. The question arises, Who is entitled to recover from the Company the value of the oats? Not Plaintiffs; for they parted with the property in them, and granted an irrevocable delivery order to Tarply. The same applies to the other consignments which make up the claim." Baron Cleasby concurred. Judgment in favour of Company.—*Tried in Exchequer Division Court, November* 21 *and* 26, 1877.—*From Law Times Reports, vol.* 38, *page* 424.

Plaintiffs carried the case to the Court of Appeal. Lord Justice Bramwell said—"I may repeat what I have said in several cases before, that I never completely understood with precision

or could exhaustively say what conversion was. No doubt, when the article is actually destroyed and consumed for the benefit of the converter, that would be a conversion both at law and in the ordinary sense of the term. But conversion has grown to be something utterly unlike conversion, and it has got to signify a thing which does not exist in nature which it is impossible to exhaustively define or describe. I cannot but think there was a technical conversion here, and technically also a cause of action, as it strikes me, against the Company for breach of their duty as warehousemen in delivering the goods without authority. To my mind, therefore, the Plaintiffs are entitled to nominal damages, and to nominal damages only. They are entitled to nominal damages because I take the law to be this: you could not purge yourself of a conversion, and I suppose cannot now; if guilty of it you must pay some damages." Lord Justice Thesiger said—"The Company delivered the goods to persons who at the time had no authority to receive them, and without any order from the Plaintiffs so to do; and although it is perfectly true that delivery was made in the expectation that subsequently a delivery order would be received from the Plaintiffs—which delivery order, in point of fact, was in a few days received—it seems to me that the previous unauthorised act, whether you call it misdelivery or pre-delivery, whether it constitutes, technically speaking, a conversion, or whether it constitutes only a breach of the contract of bailment or of the duties which flow from the bailment, was a wrongful act, in respect of which a right of action vested at once in the Plaintiffs, and that right of action once vested was not divested by the Plaintiffs afterwards giving that delivery order under which the Company might have done the act (of delivery) which they previously had done. The law presumes a legal damage in that Plaintiffs were deprived of their property in the goods from November 19 to November 24." Judgment in favour of the Plaintiffs, with 1s. nominal damages and 1s. for the technical conversion, Plaintiffs to pay the costs.—*Tried in Court of Appeal, May* 7 *and* 13, 1879.—*From Law Times Reports, vol.* 40, *page* 674.

240. *M'Bride* v. *Midland Great Western Railway Company.*—Action for £60 for alleged conversion of a waggon of

potatoes, Foxford to Dublin. On or about May 9, a potato dealer in Dublin named M'Bride made a contract to purchase two waggons of potatoes of six tons each from another dealer living at Foxford named M'Nulty, and M'Bride paid him nearly the whole of the purchase-money in advance. One waggon of the potatoes came all right, but the second one became the one in dispute. M'Bride sent 60 empty sacks to Foxford to carry the last six tons of potatoes. M'Nulty loaded two waggons of potatoes at Foxford, intending one for M'Bride—(1) waggon 175, on May 12, containing 43 sacks; (2) waggon 1008, containing 60 sacks, May 11, 1877 – and consigned them to Dublin to his (M'Nulty's) order. The waggons were both charged at the six ton waggon rate, but were not weighed by the Company. M'Nulty swore there were actually six tons of potatoes in each waggon; indeed, that waggon 175, although containing a less number of sacks, contained 6 tons 1 cwt. of potatoes. He admitted not weighing the sacks, but he professed to know the weight from having purchased the potatoes in open market in small lots by weight. A friend of M'Bride's in Foxford wrote him on the Saturday that he had seen the potatoes, and that waggon 1008, with the 60 sacks, contained potatoes of a better quality than those in 175 waggon. M'Bride met the passenger train on the Monday morning arriving at 5 a.m., expecting M'Nulty, who duly arrived. M'Bride then obtained from M'Nulty a written order for a waggon of potatoes, No. 107, as follows:— "Please give bearer, Mr. M'Bride, one waggon of potatoes, No. 107, and oblige, yours, BERNARD M'NULTY.—To the Midland Great Western Railway Company, this 14th May, 1877." M'Bride swore he asked for an order for the waggon containing the 60 sacks (he believing, from his friend's letter, that it contained the best potatoes). M'Bride also demanded the Company's receipt issued at Foxford, which M'Nulty denied having taken up. M'Nulty swore he sold M'Bride the 43 sacks potatoes in waggon 175, but not having the Company's receipt he forgot the number and wrote it as 107; that he had at the time in his pocket the Company's receipt for the 1008 waggon, and had he intended to have given M'Bride that waggon he could have given him the receipt and had no

occasion to give a written order. M'Bride on the Monday presented the order for waggon 107, and the Company's delivery clerk wrongly gave him the delivery note for waggon 1008, containing the 60 sacks. This was the waggon M'Bride's friend had advised him to get. M'Bride at once paid the carriage on 1008 waggon, and was given the delivery docket, but he did not attempt to remove the potatoes until the Wednesday. In the meantime M'Nulty had sold the potatoes in waggon 1008 to Sweetman, and handed him the Company's receipt issued at Foxford. Sweetman at once applied for the potatoes, produced the Company's receipt indorsed by M'Nulty, and a duplicate delivery docket was made out; and when M'Bride on Wednesday applied for the potatoes in waggon 1008, half had already been delivered to Sweetman. M'Bride would not accept the potatoes in 175 waggon, and after some days, when sale notice had been served, they were sold for £18 14s. 9d. M'Bride swore the sacks holding the 60 sacks potatoes in waggon 1008 were the sacks he sent to Foxford, while M'Nulty swore the sacks holding the 43 bags potatoes in waggon 175 were M'Brides sacks, and that he had the balance, seventeen sacks, at Foxford.

M'Bride contended that the issue of the delivery docket and the acceptance of the carriage was a transference of the potatoes to him by the Company, and he was entitled to recover.

The Company denied this. The Judge leaned to the opinion that the Company could not succeed unless they could show by evidence that the delivery order was obtained from them by M'Bride by a trick, or, legally speaking, by fraud.

The Company asked the Judge to direct a verdict for them on each issue separately, and submitted (1) that they were not setting up nor driven to rely on any doctrine of *jus tertii*, and that it is not necessary to charge the Plaintiff with fraud in his representations to the Company's clerk in order to entitle the Company to a verdict.

(2) That as between M'Nulty and the Company, the waggon of potatoes 1008 was M'Nulty's property unless the Company should receive M'Nulty's order for its delivery, and the Company would be liable to M'Nulty if they delivered it to anyone else

before order. The order to deliver waggon 107 did not authorise the Company to deliver any other waggon, and the unauthorised act of the Company in accepting the freight from M'Bride did not vest the property in him, and there was no conversion by the Company of waggon 1008 as against M'Bride.

The Judge seemed to lean to the opinion that if the potatoes had actually been placed in M'Bride's sacks, then the property had passed to him at Foxford, and that the Company could not possess a greater right in the potatoes than M'Nulty himself possessed. He considered the case was similar to those in 7 Ellis and Blackburne's Reports, page 705 (*Schuster* v. *M'Kellar*), and 4 Hurlstone and Norman's Reports, 822 (*Brown* v. *Hare*). These were cases where goods had been carried by sea. The Judge left the following issues to the Jury :—

(1.) Whether the 60 bags in which the potatoes were carried in waggon 1008 were the property of M'Bride or not ?

(2.) Did M'Nulty direct the Company to deliver to M'Bride the 60 bags potatoes in waggon 1008 ?

(3.) If not, was the conversation with M'Nulty such as reasonably to lead M'Bride to believe, and did he believe, that the potatoes he was to get were in the 60 bags ?

The Company's counsel asked the Judge to take a note that there was no evidence on No. 3 issue to go to the Jury.

The Jury gave negative replies to each issue, and by so doing gave a verdict for the Company.—*Tried in the Court of Exchequer, Dublin, November* 30 *and December* 1, 1877, *before Chief Baron Palles.—Reported by Author.*

CARTING AGENT'S CARTER HELD TO BE THE COMPANY'S SERVANT, AND THE COMPANY HELD RESPONSIBLE FOR HIS THEFT OF GOODS WHICH WERE UNDECLARED AND OVER £10 IN VALUE.

Case No.

Machin v. *London and South Western* (1848) 88

(*See case under "Declaration of Value."*)

GOODS ADDRESSED OR CONSIGNED "TILL CALLED FOR."

	Case No.		Case No.
Levine v. *Great Western* (1868)	233	*Chapman* v. *L. & N. W.* (1880)	191

DIGEST.

In *Levine* v. *Great Western* (1868) a truss consigned "Till called for" was delayed. Consignee applied for it on November 20, and, being a hawker, waited until November 29 at Southampton, and then left the town without his truss. Chief Baron Kelly held that Plaintiff, in point of law, had a right to say to the Company, having waited several days, "I will not now accept them. If you have them here *now*, at this moment, I am ready to take them; but if you have them not here now, I will not accept them; you must keep them yourselves and pay me the value."

In *Chapman* v. *London and North Western* (1880) two packages of drapery, "Till called for," reached destination station on March 25; consignee called on 27th March, after the goods station and the goods had been burnt. The Company were held not liable, their liability of carriers having ceased, as they had become warehousemen, and their liability was confined to taking proper care of the goods, and a warehouseman ceases *to be liable in cases of accident.*

WHEN DELIVERY IS MADE BY ONE CARRIER TO ANOTHER CARRIER.

(*See also "Delivery of Passenger's Luggage."*)

	Case No.		Case No.
Garside v. *Trent and M. N.* (1792)	241	*Kent* v. *Midland* (1874)	456
Midland v. *Bromley* (1856) ...	474		

DIGEST.

In *Garside* v. *Trent and Mersey N.* (1792) four pockets of hops were carried from Stourport to Manchester by canal, to go to Stockport. The hops were burnt in

canal warehouse the first night after discharge. It was the custom to keep the goods in the warehouse until the Stockport carrier called for them. The carrier was held exempt from liability for the destruction of the hops, being held to be a warehouseman, and holding the goods until the proper carrier called for them.

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241. *Garside* v. *Trent and Mersey Navigation.*—Action for the value of four pockets of hops destroyed by fire. They were carried by canal, Stourport to Manchester, consigned to a person at Stockport. Defendants' contract was to carry to Manchester, and there deliver to first carrier going to Stockport. The hops arrived safely at Manchester on 30th September, and that evening were put into Defendants' warehouse, where (together with other goods) they were consumed by an accidental fire that same night, and before any carrier came from Stockport to whom they could be delivered. The custom was to keep goods for Stockport in the warehouse until a carrier came from Stockport to whom they could be delivered. The Defendants made no charge for lodging and keeping the goods in their warehouse.

On the appeal case Chief Justice Lord Kenyon said—"If the Defendants were considered merely as warehousemen, there would be no pretence to say that they were liable for such an accident as the present. I do not see how we can couple the character of the carrier with that of the warehouseman, in which last the Defendants are not liable here, they not having been guilty of laches."

Justice Buller said—"The keeping of the goods in the warehouse is not for the convenience of the carrier but of the owner of the goods; for when the voyage to Manchester is performed it is the interest of the carrier to get rid of them directly, and it was only because there was no person ready at Manchester to receive these goods that the Defendants were obliged to keep them." Judgment for carrier.—*Tried in Court of King's Bench, April* 24, 1792.—*From Durnford and East's Term Reports, vol.* 4, *page* 581.

IF THE OWNERS OF CATTLE OR HORSES DO NOT TAKE THEM ON ARRIVAL THE COMPANY ARE JUSTIFIED IN SENDING THEM TO LIVERY AT OWNERS' EXPENSE.

	Case No.		Case No.
G. Northern v. *Swaffield* (1874)...	752	*Wood* v *G. N. (Ireland)* (1880)...	734

DIGEST.

In *Great Northern* v. *Swaffield* (1874) a horse arrived at Sandy Station at 10 p.m., and no person being there to receive it, and consignee's residence being sixteen miles away, the horse was sent to livery. Next morning a groom applied for it, but refused to pay 6d. livery charges. The horse remained at livery four and a half months, at a cost of £17. The Company ultimately sent the horse to consignee's residence, and sued him for the £17, and recovered it. Chief Baron Kelly said —"But no one was there to take the horse. What was the duty of the Company to do? Had they any choice? They must either have allowed the animal to stand somewhere on their station until it was starved—a place of danger, where it would have been exceedingly improper to have allowed it to remain—or they must have turned it into the high road, to the danger of itself and all the Queen's subjects; or they must have put it in safe custody, namely, under the care of a livery stable keeper who lived close at hand. I do not entertain a doubt that the Company are entitled to recover the money from the Defendant, for whose benefit they have incurred the expenditure."

In *Wood* v. *Great Northern (Ireland)* (1880), which, however, was only a Quarter Sessions case, the Judge held that the Plaintiff should have been at the station waiting to receive the horse, or applied within reasonable time after the arrival of the train, and that as he was not there the Company were justified and bound to put the horse to livery, as they had done; and having done so, they had completed their contract, and their liability ended.

DELIVERY OF CATTLE TO CONSIGNEES.

	Case No.		Case No.
Wise v. *Great W.* (1856)	750	*Combe* v. *L. & S. W.* (1874) ...	749
Rooth v. *North E.* (1867)	686	*Wood* v. *G. N.* (*Ireland*) (1880)	734
Shepherd v. *B. & E.* (1868) ...	723	*Gordon* v. *G. W.* (1881)	697
Gill v. *M. S. & L.* (1873)	728		

DIGEST.

In *Wise* v. *Great Western* (1856) a horse arrived at Windsor; it was overlooked, and remained in the horse-box until next day, when consignee applied for it. Chief Baron Pollock said—"The action was an attempt to throw on the Company that which was really occasioned by the person who sent the horse (not advising consignee). We think the mischief was within the notice, and that the horse being accepted under a special contract, the Company were not liable for any damage that might be done to him while remaining in the station till somebody came for him."

In *Rooth* v. *N. E.* (1867) cattle just unloaded from a truck, at night time, strayed on to the line and were killed. The cattle landing only admitted of one truck of cattle being unloaded at a time, and while the second truck was being shunted into position the animals already unloaded strayed. Owner's drover and nephew assisted at the unloading. Baron Martin said—"If the thing carried had been an inanimate thing, to be delivered into the hands of the person to whom it was sent, it might have been a different matter, but these were cattle that were merely let loose on the carriers' premises. It was a perfect fallacy to call that a delivery so as to put an end to the liability of the Company, if the yard was not a safe place." Chief Baron Kelly said—"If there had been a perfect and complete delivery on the cattle quitting the trucks, it did not discharge the Company from their liability to provide a safe and sufficient means of exit for the cattle."

In *Shepherd* v. *Bristol and Exeter* (1868) the cattle reached London at 12 noon Sunday instead of 7 a.m. Cattle are not allowed to be driven through London streets on Sundays after 10 a.m. The cattle were penned by consignee on Company's premises, and two died before 12 p.m. Sunday night. Baron Blackburn said—"It seems to me the Company had nothing more to do as carriers after 2 p.m. on Sunday." It was thus held that delivery was made to and had been accepted by consignee on the cattle being penned.

In *Gill* v. *Manchester Sheffield and Lincolnshire* (1873) a restive cow, on coming out of waggon, ran into a pig pen at end of cattle platform, jumped over rails of pig pen on to the line, and ran into the tunnel and was killed: the owner was present. The Court of Queen's Bench held that the mischief was attributable to the porter, who, against owner's advice, let the cow out of truck before she had been quieted.

In *Combe* v. *London and South Western* (1874) a colt, in being unloaded, got its leg in the opening where the flap of the waggon turned down. The groom, standing in the waggon, let the mare and colt free when the Company's porters said "All right." Justice Keating said—"The groom did nothing to take the matter out of the hands of the Company's servants; he did not control them in the delivery of the horses, nor was it their business to be controlled by him." Judgment against Company.

In *Wood* v. *Great Northern of Ireland* (1880), which, however, was only a Quarter Sessions case, the Judge held that Plaintiff should have been at the station waiting to receive the horse, or applied within a reasonable time after the arrival of the train, and that as he was not there the Company were justified and bound to put the horse to livery, as they had done; and having done so, they had completed their contract, and their liability ended.

In *Gordon* v. *Great Western* (1881) cattle, Waterford to Gloucester, were made "to pay" in error, as carriage

had been really paid in Waterford. The Company refused for a day to deliver, and consignee recovered £35 for delay and injury, as Company were held not to be protected by the special contract.

DELIVERY OF PASSENGERS' LUGGAGE.

	Case No.		Case No.
Richards v. *L. B. & S. C.* (1849)	454	*Kent* v. *Midland* (1874)	456
Butcher v. *L. & S. W.* (1855) ...	455	*Bergheim* v. *G. E.* (1878)	453
Mid. Railway v. *Bromley* (1856)	474		

DIGEST.

In *Richards* v. *London Brighton and South Coast* (1849) a lady's dressing-case, value £150, had been placed and was carried in the carriage under her feet. Being an invalid, she was carried out of the carriage to a hackney coach. When the hackney coach got to the house the case was missed. Justice Williams, on appeal, held that at the time of the loss the dressing-case was in the custody of the Company as carriers. "I must admit I think that before the dressing-case was lost the transit described in the declaration had come to an end. I do not mean to give an opinion whether the Company were obliged to do more than deliver the luggage on the platform. But I think if they oblige passengers by allowing their servants to carry luggage to coaches their liability continues."

In *Butcher* v. *London and South Western* (1855) a passenger had just alighted from the train with a carpet bag in his hand, and which had been carried with him in the carriage. The bag contained £400 in money. A Company's porter took the bag from the passenger, and put it on the footboard of a cab. The cab drove off, and neither cab nor bag was afterwards traced. The Chief Justice held that the case was governed by *Butcher* v. *Brighton Company*, which established that the delivery of the passenger and luggage *must be in the ordinary mode on the arrival of the train.* Parties might accept something short of what was fixed by

the contract. Whether or not there was a perfect delivery to the Plaintiff as he stood on the platform with his carpet bag in his hand was a question of fact for the Jury. The Company had not shown what they did with the bag. The Jury had previously given Plaintiff a verdict for the £400.

In *Midland Railway* v. *Bromley* (1856) a passenger arrived at Bristol, and was going on to Torquay by Bristol and Exeter Railway. The two Companies' stations adjoin. The luggage is carried across on hand trucks. Plaintiff saw the truck on which his luggage was placed pass into Bristol and Exeter station, but did not actually see it in the station afterwards. The luggage was lost. Justice Cresswell held that this case falls within the principle laid down by Justice Coleridge in *Gilbert* v. *Dale*. "The Plaintiff gives no evidence from which a Jury could determine on which of the two railways the portmanteau was lost or stolen." Judgment for Company.

In *Kent* v. *Midland* (1874) a portmanteau and carpet bag were lost at Birmingham Central Station. Owner had arrived from Bath, and was going to Chester. A London and North Western porter took the luggage from the Bath train to the platform from whence the Chester train started. At Stafford the loss was discovered. Chief Justice Cockburn held that delivery had not been made to the London and North Western Company. "The luggage when last seen was not out of the custody of the Midland Company. They were bound (Plaintiff held a through ticket) to have it conveyed to the carriages of the London and North Western Company, and for that purpose they were entitled to the services of the porter of the latter Company, who must for the occasion be taken to be their own servant."

In *Bergheim* v. *Great Eastern* (1878) a passenger about to leave by a train from Shoreditch Station directed a Company's porter to place his bag on the seat of the carriage. The porter did so, and said the bag would

be safe, and that he should be there himself until the train started. Plaintiff then went to the refreshment room, and on his return the bag had been stolen. Lord Justice Cotton said no negligence on either side had been found, and held that the Company cannot on principle be held to have undertaken the liability of common carriers in respect of the Plaintiff's bag—that is, to have contracted to become insurers of it; and the Court is not bound by the authorities, *Butcher* v. *London and South Western* and *Richards* v. *London Brighton and South Coast.* (This, although not a case of delivery, is inserted here, as in a measure it overrules the cases of Butcher and Richards in respect to the Companies' liability for luggage taken by passengers into their carriage.)

REFUSED GOODS—WHETHER DAMAGE OR DELAY CONSTITUTES A GROUND FOR THE COMPLETE REFUSAL OF THE GOODS, AND A RIGHT TO SUE FOR AND RECOVER THEIR FULL VALUE FROM THE CARRIER.

	Case No.		Case No.
Kingston v. *Preston* (1781) ...	244	*Dakin* v. *Oxley* (1864)	252
Jones v. *Barkley* (1781)	245	*Meyer* v. *Dresser* (1864)	248
Farnsworth v. *Garrard* (1807) ...	242	*Levine* v. *G. W.* (1868)	233
Shiels v. *Davis* (1814)	250	*Heugh* v. *L. & N. W.* (1870) ...	254
Cleworth v. *Pickford* (1840) ...	247	*Teats* v. *D. & N. S. P.* (1872) ...	8
Norman v. *Phillips* (1845)	246	*Horn* v. *Midland* (1872)	255
Cort v. *Ambergate N. & B.* (1851)	243	*Robinson* v. *Knights* (1873) ...	249
Garrett v. *Melhuish* (1858) ...	253	*Merchant S. Co.* v. *Armitage* (1873)	251

A question of great difficulty arises with carriers when goods, having been carried to their destination, are from damage, delay, or otherwise refused by the consignee. The consignee may be influenced in this course by some event having passed rendering the goods less saleable, or perhaps in some previous case having had a difficulty in recovering compensation from the carrier, and therefore the consignee insists upon the act of acceptance of the goods being contemporaneous with the compensation for the damage.

The question then arises as to what is the best thing for the carrier to do. The injury complained of frequently arises on a through journey, and before the goods have reached the terminal carrier who tenders the packages for delivery. He is naturally indisposed to pay money that he may never recover, before he has had time to inquire into the origin of the damage and consulted with his fellow carriers through whose hands the goods passed before he received them. In the meantime he desires to complete the delivery and free himself of the charge of the goods. This is really to the advantage of all persons concerned, because the damage from delay in unpacking the goods may lead to further deterioration, especially where the goods are of a perishable nature. The writer found a practice in force with his Company whereby the difficulty has for many years been generally met. If the consignee cannot be persuaded to accept his goods and lodge a claim for the injury he considers he has sustained, he is then served with a "Notice of Sale," stating that the goods will be sold for the carriage and storage unless removed within so many days, or, if perishable goods are in question, so many hours. This usually leads to the acceptance of the goods by the consignee. In some cases, however, where the carriage has been "paid" at the starting point, this course is not applicable until the goods have remained on hand a sufficient time for storage to accrue. The advice usually given to consignees by solicitors is that the goods must be accepted, and consignees can then sell them by public auction for their market value and sue the carrier for the loss. In the case of damage to goods a trader cannot sue for and recover the entire value of the goods when the carrier has been and is able and willing to deliver such goods, although in a damaged state. Neither can a trader safely sue for and recover for damage to goods until he shall have first unpacked and examined them so as to be able to estimate with accuracy the real extent of the damage. The following cases bear on this question, but it must be borne in mind that these cases were

decided before the introduction of the new Judicature Acts. Previous to the Judicature Acts, although in certain cases where beneficial services had been performed it was held that the Plaintiff was entitled to recover to the extent of the benefit, and that only when there was no benefit there should be no pay (*Farnsworth* v. *Garrard*), yet it was decided that this rule was not applicable to a claim for carriage for goods damaged in transit, and that in such cases, while the carrier was entitled to recover the full amount of the carriage, the consignee or owner of the goods must bring an independent action against the carrier for the damage to the goods. But now, under the Judicature Acts and Rules, the necessity of bringing cross actions has been to a great extent abolished, and a Defendant may generally set up, by way of set-off or counter-claim, any right or claim against the Plaintiff. See section 24, sub-section 3, of the Act of 1873 (English)—section 27, sub-section 3, Act of 1877 (Irish); Order 19, Rule 3 (English), and corresponding Schedule Rule 22 (Irish); and Order 22, Rule 10 (English)—Order 21, Rule 10 (Irish). The words of Order 19, Rule 3 (English), Schedule Rule 22 (Irish), are—

"A Defendant in an action may set off or set up, by way of counter-claim against the claims of the Plaintiff, any right or claim, whether such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment on the same action, both on the original and on the cross claim. But the Court or a Judge may, on the application of the Plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action or ought not to be allowed, refuse permission to the Defendant to avail himself thereof."

Thus, in an extreme case, the carrier, rather than allow himself to be sued for the entire value of the goods, or rather than be compelled to retain charge of the goods for an unlimited period of time at consignee's pleasure, can raise the question himself in a Court of law, can recover his carriage, can get rid of the goods, and can have the damage to the goods fixed and determined by a Jury, and so end the transaction.

A PERSON CAN, IN SOME CASES, SUE ON AN IMPERFECTLY COMPLETED CONTRACT, AND RECOVER TO THE VALUE OF HIS WORK DONE.

DIGEST.

In *Kingston* v. *Preston* (1781) Lord Mansfield said—"There are a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his part, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act."

In *Jones* v. *Barkley* (1781) Justice Buller said "that where something is covenanted or agreed to be performed by each of two parties at the same time, he who is ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part."

In *Farnsworth* v. *Garrard* (1807) the Plaintiff, a builder, had rebuilt the front of a house for Defendant, which was out of perpendicular and likely to fall, and Plaintiff sued for the damage. Lord Ellenborough said—"The Plaintiff is to recover what he *deserves*. If there has been no *beneficial service*, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the Plaintiff's demand, *leaving the Defendant to his action for negligence*."

In *Cort* v. *A. N. & Boston Railway* (1851) the Plaintiff, a contractor, had contracted to supply to the Company 3,900 tons of iron chairs, but owing to the Company not raising their capital they could not proceed with their line, and only took 1,787 tons of the chairs. The Company would not pay for the chairs they had received because the contract had not been completed. Justice Coleridge held—"The sender had been desirous and able to complete the contract, and he might main-

tain an action against the purchaser for breach of contract, and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract; that the Defendants refused to accept the residue of the chairs, and that they prevented and discharged the Plaintiff from manufacturing and delivering them." In like manner a carrier may be able and willing to complete the contract of carriage by delivering the goods, although deficient in quantity, while the consignee may refuse to accept.

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242. *Farnsworth* v. *Garrard.*—Action of assumpsit for work and labour done and materials supplied.

The Plaintiff had rebuilt the front of a house for the Defendant, but when finished it was considerably out of the perpendicular, and, according to several witnesses, in great danger of tumbling down, though others said it might stand for many years. The action was for work and labour done and materials found.

Lord Ellenborough said—"The Plaintiff is to recover what *he deserves.* It is therefore to be considered how much he deserves, or if he deserves anything. If the Defendant has derived no benefit from his services he deserves nothing, and there must be a verdict against him. There was formerly considerable doubt upon this point. The late Mr. Justice Buller thought (and I, in deference to so great an authority, have at times ruled the same way) that in cases of this kind a cross action for the negligence was necessary, but that if the work be done the Plaintiff must recover for it. I have since had a conference with the Judges on the subject, and I now consider this is the correct rule—that, if there has been no *beneficial service,* there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the Plaintiff's demand, *leaving the Defendant to his action for negligence.* The claim shall be co-extensive with the benefit. If the wall will not stand, and must be taken down, the Defendant has derived no benefit from the Plaintiff's services, but has suffered an injury. In that case, he might have given

him notice to remove the materials. Retaining them, he is not likely to be in a better situation than if the Plaintiff had never placed them there; but if it will now cost him less to rebuild the wall than it would have done without these materials, he has some benefit, and must pay some damages." Verdict for Defendant.—*Tried at Nisi Prius, December* 8, 1807.—*From Campbell's Reports, vol.* 1, *page* 38.

243. *Cort* v. *Ambergate Nottingham Boston and Eastern Junction Railway Company.*—Action in respect to a contract where the Plaintiff contracted to supply 3,900 tons of iron chairs to the Defendant Railway Company for the construction of their line. The chairs were to be delivered in lots as required. It appeared the Company had not succeeded in obtaining the necessary capital, and were unable to go on with the construction of the line, and from time to time stopped Plaintiff in the course of manufacturing the chairs, requiring him to send forward very small quantities. At last the engineer said that if the Plaintiff had 100 tons of chairs already made he might send them, but he was not to make any more, as they would not be wanted, for the Company had as many as were necessary to carry the line to Grantham. At this time the quantity of chairs delivered was 1,787 tons. The Plaintiff now claimed the sum of £12,100 for the delivery of the 1,787 tons of chairs.

In defence an endeavour was made to show that the Plaintiff had not the necessary means to complete his contract, and that the delay and final cessation took place with his concurrence. On the first trial Justice Coleridge, in charging the Jury, said, as to damages, the Plaintiff, if he had a verdict, was entitled to be put in the same position as if he had completed his contract. The Jury found for the Plaintiff, damages £1,800. The Company appealed, and on the appeal case Lord Chief Justice Campbell said—"Upon the whole, we think we are justified on principle, and without trenching on any former decision, in holding that when there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice

to the sender not to manufacture any more, as he has no occasion for them and will not accept or pay for them, the sender having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract, and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract; that the Defendants refused to accept the residue of the goods, and that they prevented and discharged the Plaintiff from manufacturing and delivering them. We are likewise of opinion that in this case the damages are not excessive, as the Jury were justified in taking into their calculation the chairs which remained to be delivered and which the Company refused to accept. The obligation was incumbent upon the Company to accept the whole of the residue." Judgment against the Company.—*Tried in the Court of Queen's Bench, May* 25, 1851. —*From Adolphus and Ellis's Queen's Bench Reports, vol.* 17, *page* 127.

244. *Kingston* v. *Preston.*—Lord Mansfield said—"There are three kinds of covenants—first, such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenant in his favour, and where it is no excuse for the Defendant to allege a breach of the covenant on the part of the Plaintiff. Second, there are covenants which are conditional and dependent, in which the performance of one depends upon the prior performance of another; and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his part, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act."—*See Douglas's King's Bench Reports*, 1781, *page* 664.

245. *Jones* v. *Barkley.*—Action in respect to non-performance of a contract.

It was held in this case by Justice Buller that where some-

thing is covenanted or agreed to be performed by each of two parties at the same time, he who is ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part.

This decision was upon the principle clearly laid down in *Kingston* v. *Preston*, and it would thus appear, in a contract for the carriage of goods, where the consignee refuses to accept the goods, an action will lie against him for not performing his part of the contract.—*Tried in the Court of King's Bench, June* 19, 1781.—*From Douglas's Reports, page* 659.

246. *Norman* v. *Phillips.*—Action in respect to refused goods between the sender and consignee. Plaintiff sold Defendant, a builder at Wallingford, some timber. The order was a verbal one, and on arrival of the timber at Wallingford Station, consignee refused to receive it.

On the appeal case Baron Alderson said—"If it had not been for the case of *Bushel* v. *Wheeler*, I should have said there was no evidence whatever of acceptance for the Jury. The true rule appears to be, that acceptance and delivery under the Statute of Fraud means such an acceptance as precludes the purchaser from objecting to the quality of the goods, as, for instance, if, instead of sending the goods back, he keeps or uses them. Here the goods were not in the possession of the party himself. Thus the same rule would hold if they were delivered to a general agent or to a party who is authorised by him to examine the quality of the goods. But the carrier is only an agent for the purpose of carrying, and here the purchaser himself immediately refused to take the goods. If a carrier is not originally an agent to accept the goods, he cannot be made so by mere lapse of time. After the case of *Bushel* v. *Wheeler*, I cannot say there is *no* evidence of acceptance to go to the Jury; but I think that a verdict for the Plaintiff on such facts as those which exist in the present case is clearly not warranted by the evidence, and the Court will therefore set aside the verdict found for the Plaintiff as not warranted by the evidence."—*Tried in the Court of Exchequer, June* 11, 1845. —*From Meeson and Welsby's Reports, vol.* 14, *page* 277.

247. *Cleworth* v. *Pickford*.—Action for work and labour done on a special contract. The Plaintiff was a boatman employed by Pickford & Company, carriers, and the condition of his hiring was as follows:—Plaintiff was hired by Defendants as master of a canal boat under and by virtue of an express contract and agreement made on the 1st January, 1835; and said contract stipulated that as master of the said boat he was to be fully and absolutely responsible to the Defendants for the preservation, safety, and due delivery of all goods taken on board by him, and he was to be charged for all pilferages of, or damages, or loss whatever to or in respect of any goods then under his charge, by whomsoever committed or sustained, and from whatsoever cause, so as and that the amount of the said pilferages or damages so sustained, although not actually paid by the Defendants, were to be deducted from his wages or other demand of his against the Defendants, and might be pleaded or set off accordingly.

On the 5th February, 1835, a pipe of wine, value £100, was loaded in Plaintiff's boat, to be carried from London to Leek. During the transit certain of the contents of the said pipe of wine, viz., 20 gallons, were pilfered and lost out of the said pipe, and water substituted in lieu thereof, whereby the said pipe of wine was greatly damaged and injured to the extent of £50, which exceeded the amount claimed by Plaintiff for work and labour done.

Chief Baron Lord Abinger said—"The plea states that the Plaintiff, by the original contract under which his services were rendered, agreed to accept in satisfaction and payment such sum as might be due after deducting any payments which the Defendants were liable to make in consequence of his negligence. If that was the contract, it was not a contract which entitled the Plaintiff to maintain an action of *indebitatus assumpsit* for his services."

Baron Alderson said—"I am of opinion that this plea is either equivalent to the general issue, or else is a plea of set-off which has not been answered by replication, that being inconsistent with the circumstances stated in the plea. The replication says that the Defendants broke their promise without the excuse mentioned in the plea, but the plea does not offer an

excuse for breaking the contract declared in it; it says the Defendants have not paid the Plaintiff because under the agreement between them they have a demand against the Plaintiff in respect of the damages sustained by them by reason of his negligence to a greater amount, which they are willing to set off." Leave to amend on payment of the costs, otherwise Judgment for the Defendants.—*Tried in the Court of Exchequer, Michaelmas Term*, 1840.—*From Meeson and Welsby's Reports, vol.* 7, *page* 314.

AMOUNT OF DAMAGE TO GOODS COULD NOT BE DEDUCTED FROM THE CARRIAGE.

(*See now the Judicature Acts and Rules cited before, page* 438.)

DIGEST.

In *Meyer* v. *Dresser* (1864) 600 staves were found deficient in a ship, Memel to London, being part of the cargo. It appeared they had been short shipped. The consignee deducted £41 1s. 6d. of the freight as their value. Chief Justice Erle said—"It was clear the money claimed (by the carrier) was due under the contract. I think there was no right to deduct. I consider it to be established law that the freighter cannot set off against the amount of freight due to the shipowner the value of goods damaged, even by carelessness and negligence of the master and crew. The right, if any, is by cross action. This is the established law of England."

In *Robinson* v. *Knights* (1873) a cargo of lathwood was carried, Riga to London, for a lump sum of £315. Lathwood to the value of £16 19s. 9d. loaded on deck was washed overboard and lost. The consignee deducted the value, and the shipowner now sued for it. Justice Keating held—That the ship owner was, on delivery of the remainder of the cargo, entitled to the full sum of £315, irrespective of the fact that a portion of the cargo was deficient.

248. *Meyer* v. *Dresser*.—Action for freight. Part of the goods were missing, and consignee claimed to deduct the value of the goods deficient from the gross weight. The cargo consisted of oak barrel staves from Memel to London, and on arrival of the ship at London 600 staves were not on board, they never having in fact been shipped. The Defendant therefore insisted upon deducting their value, £41 1s. 6d., from the freight due upon the cargo.

On the first trial the Jury negatived the custom relied on by the Defendant, and gave a verdict for the Plaintiff for £37 6s. Leave was reserved to appeal.

On the appeal case Chief Justice Erle said—"The charter-party and bill of lading were put in, and upon the Plaintiff's case it was clear that the money claimed was due under the contract. I think there was no right to deduct. Upon general principles of loss I think the right claimed has no existence. It is admitted that the 600 staves were never put on board. It was by a mere mistake they were left behind. I consider it to be established law that the freighter cannot set off against the amount of freight due to the shipowner the value of goods damaged, even by carelessness and negligence of the master and crew. The recent case of *Dakin* v. *Oxley* (15 Common Bench Reports, 646) is replete with references to learned authorities to that effect. The point decided there was that where the cargo had, through the misconduct of the master and crew, become so damaged in the course of the voyage as to be worthless, and less than the amount of the freight on its arrival at its destination, the shipper could not abandon it to the owner for the freight. But the authorities collected by the learned Judge who prepared that Judgment show that our law, in common with the laws of most other mercantile countries, negatives the right of the owner of the cargo to set off damage to the goods against freight. Neither do I think such a set-off can be allowed against the freight due for other goods of the value of goods that are missing and have never been put on board. *The right, if any, is by cross action. This is the established law of England.*"

Justice Byles said—"My Lord and my brother Willes have called attention to the authorities in which, from *Mondel* v.

Steel (8 M. & W., 858) down to the last term in this Court, *Dakin* v. *Oxley*, and also in the Admiralty Court, it has been in effect determined that neither damage to the goods nor loss can be set off against the freight."—*Tried in the Court of Common Pleas, May* 6, 1864.—*From Scott's Common Bench Reports, vol.* 16, *page* 646.

249. *Robinson* v. *Knights.*—Action for recovery of freight for carriage of a cargo of lathwood. The total freight agreed to be paid for the carriage of the cargo of lathwood was a lump sum of £315. A quantity of the lathwood was loaded on the deck of the ship, and between Riga and London, owing to rough weather, the deck load was washed overboard and lost, without any default on the part of the master or crew. The Defendant deducted £16 19s. 9d. freight on that portion of the cargo which had been lost, and the action was brought to recover the amount so deducted. On the first trial, in the Mayor's Court, London, a verdict was entered for the Plaintiff, leave to appeal being given.

On the appeal case Justice Keating held—That the ship-owner was, on the delivery of the remainder of the cargo, entitled to the full sum of £315, irrespective of the fact that a portion of the cargo was deficient.—*Tried in the Court of Common Pleas, May* 31, 1873.—*From Law Reports, Common Pleas, vol.* 8, *page* 465.

THE CARRIER CAN SUE FOR HIS CARRIAGE AND IS NOT CONFINED TO HIS LIEN WHERE THE GOODS ARE NOT VALUE FOR THE CARRIAGE (*i.e.*, EMPTY PACKAGES).

DIGEST.

In *Shiels* v. *Davis* (1814) the carrier sued for his carriage of butter that had been damaged by bad stowage. Chief Justice Gibbs held that the bad stowage of the goods was the subject of a cross action, and did not affect the right to the freight, and gave the carrier a verdict for his whole demand.

In *Dakin* v. *Oxley* (1864) Chief Justice Willes said—

"The doctrine that the cargo is the sole and exclusive security for the freight, to which the shipowner ought to be contented to look, and for which the merchant ought to be allowed to free himself from any responsibility, must now be considered as exploded, upon the plain ground that the contract to pay for the carriage of a thing in money cannot be satisfied by a concession of the thing itself in a damaged state to the carrier against his will."

In *Merchant Shipping Company* v. *Armitage* (1873) a ship, Cochin to London, took fire on the voyage, and the ship was scuttled and the general cargo injured. The freight on the damaged portion of cargo was estimated as £1,153. The contract of carriage was a lump sum of £5,000. Defendant refused to pay the £1,153. Baron Bramwell held the shipowner could recover the £1,153, and Defendant would have to pay the freight and seek his remedy by a cross action.

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250. *Shiels* v. *Davis.*—Action for the freight of a quantity of butter carried in a general ship, and received under a bill of lading. The defence proposed to be set up was that the butter had been injured by bad stowage to a degree much beyond the amount of the freight.

Chief Justice Gibbs held that the bad stowage of the goods was the subject of a cross action, and did not affect the right to the freight, and gave Plaintiff, the carrier, a verdict for his whole demand.—*Tried at Nisi Prius, Michaelmas Term,* 1814. —*From Campbell's Reports, vol.* 4, *page* 119.

251. *The Merchant Shipping Company* v. *Armitage.*—Action for the recovery of freight on a general cargo loaded from Cochin to London. During the voyage the ship was found to be on fire, and the captain put into Table Bay, the nearest port of refuge. In order to extinguish it, it was found expedient to scuttle the ship, and the ship was scuttled in Table Bay and the fire extinguished. The water was then pumped out, and the greater part of the cargo unladen, but it was found to be greatly injured by fire and water, and was consequently sold.

The contract for the freight was a lump sum of £5,000. The Defendant refused to pay Plaintiff more than £3,847, desiring to deduct £1,153 freight upon the damaged portion of the cargo. The case of "*Norway*" (3 Moo. P.C., (N.S.), 245) was quoted as a similar case. It was held that the shipowner was entitled under the charter-party to the full sum of £5,000.

Baron Bramwell said—"Suppose that £5 worth of goods had been stolen by the crew, that would not be within the exceptions. Then would it have been possible to have said that the whole lump sum was lost? Would not the common rule have applied. The Defendant would have had *to pay the freight and seek his remedy by a cross action.* If that is so, is it not very odd that the shipowner is worse off because he is not subjected to an action than if he had been subjected to an action?—that is to say, he is worse off because fire has caused the loss than he would have been if it had been owing to a depredation of the crew. Judgment for shipowner."—*Tried in the Court of Exchequer Chamber, November* 28, 1873.—*From Law Reports, Queen's Bench, vol.* 9, *page* 99.

If the Goods are Entirely Destroyed, and there are None to Deliver, the Contract cannot be Completed.

DIGEST.

In *Garrett* v. *Melhuish* (1858) a cargo of bricks had been carried, Jersey to Sydney, N.S.W., and owing to heavy machinery having been stowed upon the bricks, it was found on arrival they were reduced to powder or otherwise useless. Vice-Chancellor Stuart, in Court of Appeal, held "there was no ground to argue that the bricks were not actually delivered at Sydney," and the shipowner could recover his carriage. "If there were any question as to the condition in which the goods arrived, if their owner thought that he had sustained any loss by reason of the misconduct or negligence of those to whom they had been entrusted for conveyance, he must seek his remedy in an independent action."

In *Dakin* v. *Oxley* (1864) Chief Justice Willes said—"In the case of an actual loss or destruction by sea, damage of so much of the cargo that no substantial part of it remains—as if sugar in mats, shipped as sugar and paying so much per ton, is washed away, so that only a few ounces remain, and the mats are worthless—the question would arise whether, practically speaking, any part of the cargo contracted to be carried has arrived.

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252. *Dakin* v. *Oxley*.—Action in respect to a refusal of goods owing to their deterioration and damage. In this case a cargo of coals was shipped from Newport, Monmouthshire, to Nassau, New Providence, and on arrival at New Providence the same cargo of coals became, by the default of the master and mariners of the same vessel, and by reason of their negligence and unskilfulness in the management of the same vessel on the same voyage, and not otherwise, so greatly damaged and deteriorated in condition that the said coals were then of less value than the amount of the said freight.

Chief Justice Willes said—"The doctrine that the cargo is the sole and exclusive security for the freight, to which the shipowner ought to be contented to look, and by which the merchant ought to be allowed to free himself from any responsibility, must now be considered as exploded, upon the plain ground that the contract to pay for the carriage of a thing in money cannot be satisfied by a concession of the thing itself in a damaged state to the carrier against his will. Casaregis, who was born at Genoa in 1670 and died in 1737, after having been for more than 20 years a Judge of the Rota of Florence, says that in the case of culpable damage it is not competent to the merchant to abandon the cargo to the shipowner and claim the whole value, except where the goods are reduced to a state of uselessness or nearly so, clearly showing that the right of abandonment in such a case affects the amount of damages, and not the freight.

"In the case of an actual loss or destruction by sea damage of so much of the cargo that no substantial part of it remains—as if sugar in mats, shipped as sugar and paying so much

per ton, is washed away, so that only a few ounces remain, and the mats are worthless—the question would arise whether, practically speaking, any part of the cargo contracted to be carried has arrived. The task, however, of finding a uniform rule in foreign and commercial law is at present impossible.

"Where the quantity remains unchanged, but by sea damaged, and the goods have been deteriorated in quality, the question of identity arises in a different form, as, for instance, where a valuable picture has arrived as a piece of spoilt canvas, cloth in rags, or crockery in broken shreds, iron all or almost all rust, rice fermented, or hides rotten. In both classes of cases, whether of loss of quantity or change in quality, the proper course seems to be the same, namely, to ascertain from the terms of the contract, construed by mercantile usage, if any, what was the thing for the carriage of which freight was to be paid, and, by the aid of a Jury, whether that thing, or any, or how much of it, has substantially arrived.

"If it has arrived, though damaged, the freight is payable by the ordinary terms of the charter-party, and the question of fortuitous damage must be settled with the underwriters, and that of culpable damage in a distinct proceeding for such damage against the ship captain or owners.

"It would be unjust and almost absurd that, without regard to the comparative value of the freight and cargo when uninjured, the risk of a mercantile adventure should be thrown upon the shipowner by the accident of the value of the cargo being a little more than the freight, so that a trifling damage much less than the freight would reduce the value to less than the freight; whilst, if the cargo had been much more valuable and the damage greater, or the cargo worth a little less than the freight and the damage the same, so as to bear a greater proportion to the whole value, the freight would have been payable and the merchant have been put to a cross action. Yet this is the conclusion we are called upon by the Defendant to affirm in his favour, involving no less than that that damage, however trifling, if culpable, may work a forfeiture of the entire freight, contrary to the just rule of our law by which each party bears the damage resulting from his own breach of contract, and no more.

"The extreme case above supposed is not imaginary, for it

has actually occurred on many occasions, and notably upon the cessation of war between France and England in 1748, which caused so great a fall in prices that the agreed freight in many instances exceeded the value of the goods. The merchants in France sought a remission of freight, or the privilege of abandonment, but in vain—*Boulay-Paty Cours de Droit, Commercial*, 485 *and* 486.

"It is evident from this rule of the law that there is neither authority nor sound reason for upholding the proposed defence."

Judgment in favour of the captain of the ship to recover the freight notwithstanding the damage suffered by the coal.—*Tried in the Court of Common Pleas, February* 1, 1864.—*From Scott's Common Bench Reports, vol.* 15, *page* 646.

253. *Garrett* v. *Melhuish.*—Action for freight on 33,000 bricks, carried from Jersey to Sydney, New South Wales. On arrival of the bricks at Sydney they were found to have been reduced to dust or otherwise rendered useless for building purposes owing to heavy machinery having been stowed above them.

Vice-Chancellor Sir J. Stuart said there was no ground whatever for the argument that the bricks were not actually delivered at Sydney. It appeared that they were carried thither and placed at the disposal of the Defendant's agent. It had been argued that upon a contract to carry goods from one port to another at a fixed rate the sender may resist payment of freight by showing, if he could, that through the fault of the shipowner or his agents the goods had sustained injury or had arrived in a state unfit for use; such a doctrine never was, nor could it ever have been, the law of a commercial country. If there were any question as to the condition in which the goods arrived at the port of destination, if their owner thought that he had sustained any loss by reason of the misconduct or negligence of those to whom they had been entrusted for conveyance, he must seek his remedy in an independent action; and that rule had been wisely established, for it was plain that an action against the shipowner for damages of this nature had no necessary connection with the

previous contract made in respect of the freight. In the present case, therefore, he thought that the bricks having been carried to Sydney, the port of destination, the contract in respect to which freight was payable had been performed, and though the bricks arrived there in a decomposed state, yet that fact was no answer to the Plaintiff's claim; consequently, the Chief Clerk having, in his opinion, arrived at a conclusion beyond all doubt correct, the motion must be refused as to these points, with costs. Judgment for carrier.—*Tried in the Court of Appeal, April* 27, 1858.—*From the Jurist Reports, vol.* 4 (*New Series*), *page* 943.

REFUSED GOODS—WHERE THE QUESTIONS OF THEFT AND DEPRECIATION IN VALUE AROSE.

254. *Heugh* v. *London and North Western Railway Company.*—Claim for value of a bale cotton duck fraudulently obtained from Company, Manchester to London. A man named Nurse, who had been in the employ of the Southwark India Rubber Company, fraudulently ordered the bale in that Company's name. The senders executed the order, and the Railway Company carried and tendered the bale to the India Rubber Company, whose man refused it. The Railway Company took the bale back to their station, and sent the India Rubber Company an advice note, by post, that the goods lay there at the risk and expense of the consignees, with a request that when they should send for the goods or give directions with respect to them, the person whom they should send or to whom they should give the direction should produce the advice note in question. By some means not stated, Nurse got this note, and produced it at the station and got the bale. The senders then commenced an action against the Company for the value of the bale, and the case was first tried before Chief Baron Kelly, at the Guildhall, June, 1869. The Jury found the Railway Company had acted with due and reasonable care, and the verdict was entered for them. A rule was obtained by Plaintiffs to enter the verdict for them, on the ground that the delivery to Nurse was a conversion, or for a new trial, on the ground that the Judge should have directed the Jury that upon

the refusal of the consignees to receive the goods the Company held them for the senders.

On the appeal case Chief Baron Kelly said—"It is contended that the delivery to Nurse amounted in itself, as a matter of law, to a conversion. No authority, however, has been cited in support of that proposition. It is true that, as a matter of law, a delivery to the wrong person by a carrier, while he is still clothed with the character of a carrier, has been held to amount to a conversion. But in this case the character of *carrier* had ceased when the delivery complained of took place, and, whatever may have been the character which had then devolved upon the Company, it certainly was not the character of carriers. The Company may not improperly be described as involuntary bailees (warehousemen.) Under the circumstances, we cannot interfere with the finding of the Jury that the Company have acted with reasonable care and caution as to the goods in question, and therefore they are entitled to retain their verdict."

Baron Martin—"The Company were involuntary bailees and nothing else. The goods, instead of being delivered at the place of delivery, are forced upon the Company's hands, and they, from being carriers, become persons in the condition of having goods forcibly placed in their hands against their will. If a person undertakes the duty of a carrier there is a most onerous duty imposed upon him. He becomes, in point of fact, an insurer; and when he has done all he has contracted to do *as carrier* that condition ceases, and he may be in the condition of a man with goods forced upon him, and that imposes upon him the duty of acting as a reasonable and prudent man would act. What were the Company to do here other than they did? I do not think it is possible to doubt that my Lord's direction to the Jury was the correct one. I think that the delivery to a person who was not entitled to it does not of necessity make such delivery amount to a breach of the carriers' duty. I think, too, that the verdict was right. I cannot see that there was any negligence or any improper want of care on the part of the carriers in doing what they did. They were misled by the same man who misled the Plaintiffs. I should have found the same verdict myself had I been on the Jury."

Baron Channell concurred. Judgment for Company.—*Tried in the Court of Exchequer, November* 24, 1869, *and January* 11 *and* 12, 1870.—*From Law Journal Reports, vol.* 39, *page* 48.

255. *Horn* v. *Midland Railway Company.*—Claim, £283, for difference in the price of 4,595 pairs of military shoes between 4s. and 2s. 9d. per pair, which were delivered to consignee on the morning of the 4th February, instead of the evening of the 3rd February, 1872. Plaintiffs, the senders at Kettering, were under contract to deliver the shoes in London to consignee on the 3rd February. Senders advised the station-master they were under contract to deliver by the 3rd February when delivering the goods. The shoes were for the French army, but owing to an unexpected cessation of the French and Prussian War the shoes were not required. Had the shoes, however, been delivered to consignee on the 3rd February, he was bound by his contract with senders to take them and pay 4s. per pair. It was admitted that the ordinary market value was less than 4s. per pair, that sum being contracted for owing to the special circumstances. On the refusal of the shoes, Plaintiffs could not possibly get more than 2s. 9d. per pair for them. The Company paid £20 into Court as a sufficient sum to cover the damages. On the first trial a verdict was given by consent for £283, subject to a special case being submitted for appeal.

On the appeal case Justice Willes said—"According to *Hadley* v. *Baxendale*, which corrected the law as laid down in *Bulstrode*, the damages are to be limited to the damages ordinarily contemplated by both parties. Here there was no change in the (market) value of the goods between one day and the next. It is impossible to say that the Company's officer consented to be answerable for the particular damage. There was a penalty affixed (refusal of goods) for non-delivery in the contract between the senders and the consignee, of which the Company had no notice, and of the origin and circumstances of which they had no notice. The Company's officer ought to have been informed of the circumstances under which it became material that they should be delivered."

Justice Keating said—"I come to the conclusion that this

was an exceptional state of things." The carriers had notice that the senders were under a contract to deliver by a particular time, and that they must be answerable for the ordinary consequences of not delivering at that time, but it is sought to fix upon them a peculiar liability arising from the exceptional circumstances of the contract. Justice Keating said—"I think the rule laid down in *Hadley* v. *Baxendale* ought not to be extended to such a case as this." Judgment for Company.—*Tried in Court of Common Pleas* (*Second Division*), *June* 6, 1872.—*From Law Journal Reports*, *vol.* 41, *page* 264.

The Plaintiffs appealed to the Court of Exchequer Chamber, when Chief Baron Kelly, Justice Blackburn, Justice Mellor, and Justice Cleasby, forming the majority of the Court, affirmed the previous Judgment. Baron Pigott and Justice Lush dissented, and thought Plaintiffs should recover the full amount of the loss. Justice Lush said—"I think the Judgment of the Court below should be reversed. A common carrier cannot refuse to carry, but if it be sought to impose upon him an extra liability he may decline to do so or fix a higher rate. This seems deducible from *Riley* v. *Horne* (5 Bing., 212), where Chief Justice Best says—'As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents against which no care on the part of the carrier can protect him, he is as much entitled to be paid a premium for his insurance of their delivery at the place of their destination as for the labour and expense of carrying them there. . . . He must take what is offered to him to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage. . . The loss of one single package might ruin him. . . . As the law compels carriers to undertake for the security of what they carry, it would be most unjust if it did not afford them the means of knowing the extent of their risk. . . . A carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are, and what they are worth, the carrier may refuse to take charge of them; but if he does take charge of them he waives his right to know their contents and value.' In this case information was conveyed to the station-master that the Plaintiffs were

sending the goods under a beneficial contract, which would be lost by non-delivery. It is true the Plaintiffs did not say how much would be lost, but this was not necessary, for, as was said in *Riley* v. *Horne*, 'it is the duty of the carrier to inquire of the owner as to the value of the goods, and if he neglects to make such inquiry he is responsible for the full value of the goods, however great it may be.' If he does not ask, it is too late to object. I think there was a special contract by which the Company assented to indemnify the Plaintiffs if this loss occurred." Judgment for Company.—*From Law Journal Reports, Common Pleas, vol.* 42, *page* 59.

GOODS ON HAND, WHETHER HELD UNDER THE CONTRACT "TO CARRY" OR AS WAREHOUSEMAN.

WAREHOUSEMAN'S LIABILITY IN GENERAL.

	Case No.		Case No.
Southcote's Case (1601)	256	*Wilson* v. *Brett* (1842)	259
Finucane v. *Small* (1795)	257	*Gibbin* v. *M'Mullen* (1869) ...	260
Mackenzie v. *Cox* (1840)	258	*Searle* v. *Laverick* (1874)	261

DIGEST.

In *Finucane* v. *Small* (1795) Defendant had undertaken charge of a trunk at 1s. per week, and goods had been stolen out of it. Lord Kenyon held Defendant not liable, the trunk being lodged in a place of safety; and if such goods are stolen by the Defendant's own servants, that is not negligence sufficient, inasmuch as Defendant has taken as much care of them as of his own.

In *Gibbin* v. *M'Mullen* (1869) securities lodged with a banker, for which no consideration was paid for warehousing, were stolen by the banker's cashier, who kept the key of the strong room. As there was no evidence of negligence on the part of the banker, he was held not liable.

In *Mackenzie* v. *Cox* (1840) a dog locked in a livery stable was stolen during the night-time by some person having a duplicate key. It was held that the livery stable keeper had taken reasonable care, and was consequently not liable.

In *Searle* v. *Laverick* (1874) two carriages were warehoused with a livery stable keeper, and owing to a newly-erected building being blown down by a strong wind the carriages were injured. The Court held the Defendant had employed a capable builder, and had

done all that a careful man would do, and hence he was not liable for the accident.

Story on Bailments, pars. 536 *and* 537, *page* 519.—"In all cases the material point upon which the controversy hinges is whether the one character or the other predominates in the particular stage of the transaction. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier begins with the receipt of the goods. So if an innkeeper is at the same time a carrier, and goods are sent to his inn and received by him for transportation, he is liable as a carrier for any loss before they are put upon their transit."

"On the other hand, if a person is at the same time a common carrier and a forwarding merchant, and he receives goods into his warehouse to be forwarded according to the future orders of the owners, if the goods are lost by fire before such orders are received or the goods are put in transit, he is not chargeable as a common carrier, but only as a warehouseman.

256. *Note to Southcote's Case—Coke's Reports, vol.* 2, *page* 487.—That a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole Court *ex relat M'ri. Bunb.*, note, 3rd ed., Lord Raymond's; *Coggs* v. *Bernard*, 911 Vid.; *Jones on Bailment*, 41, 83 b.; in *Kettle* v. *Bromsall*, Willes' Rep., 121. Chief Justice Willes, in delivering the Judgment of the Court, observed that according to *Southcote's Case*, the case of *Coggs* v. *Bernard*, and several other cases, if the goods were delivered to be kept safely, though the Defendant had been robbed of them, "detinue" would lie against him, for he must take his remedy against the thief or the hundred as he can. But if the goods were delivered to the Defendant to take care of them as his own proper goods, and if he be robbed of them, that is a good plea.—*Tried in King's Bench*, 1601.

257. *Finucane* v. *Small.*—Action for the value of goods stolen out of a trunk entrusted to the care of Defendant, an upholsterer, by Plaintiff, an officer in the army. Plaintiff was to pay 1s. per week for the warehousing or house rent.

Lord Kenyon said—"To support an action of this nature, positive negligence must be proved. It has appeared in evidence in this case that the goods were lodged in a place of security, and where things of much greater value were kept. This is all that it is incumbent on the Defendant to do; and if such goods are stolen by the Defendant's own servants, that is

not a species of negligence of a description sufficient to support this action, inasmuch as he has taken as much care of them as of his own." Judgment for warehouseman.—*Tried at Nisi Prius, May* 29, 1795.—*From Espinasse's Reports, vol.* 1, *page* 315.

258. *Mackenzie* v. *Cox.*—Action for value of a dog deposited with a livery stable keeper. The dog was locked up in a stable, and it appeared that in the night-time some person with a duplicate key opened the stable and stole the dog. Baron Gurney said to the Jury—"It is for you to say whether locking the dog into a stable was not taking reasonable care of it; and if you think that it was, and that a dog-stealer came in the night and stole this dog, then the Defendant is not answerable for this loss." Verdict for livery stable keeper.—*Tried at Nisi Prius, December* 1, 1840.—*From Carrington and Payne's Reports, vol.* 9, *page* 632.

259. *Wilson* v. *Brett.*—Action in respect to negligence where a person who rode a horse gratuitously, at the owner's request, for the purpose of showing him for sale, was held bound, in doing so, to use such skill as he actually possesses; and if proved to be a person conversant with and skilled in horses, he is equally liable with the borrower for injury done to the horse while ridden by him.

Baron Rolfe, on the appeal case, said—"The distinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous which another not so skilled as he, does not, surely that makes a difference in the liability. I said I could see no difference between negligence and gross negligence—that it was the same thing, with the addition of a vituperative epithet—and I intended to leave it to the Jury to say whether the Defendant, being, as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence." The Jury had found for the Plaintiff, damages £5 10s., which was

affirmed.—*Tried in the Court of Exchequer, January* 27, 1843. —*From Meeson and Welsby's Reports, vol.* 11, *page* 113.

260. *Gibbin* v. *M'Mullen.*—A customer of a banker deposited with his banker securities for safe keeping. The securities were stolen by a cashier in the employ of the bankers. Held—That the bankers were not liable unless the loss was occasioned by their gross negligence. The customer deposited with his bankers a box containing securities, of which he kept the key. The box was kept in a strong room of the bank, where likewise was the manager's box, containing the securities of the bank. Access to the strong room was only obtained by passing through a compartment where a cashier sat by day and a messenger slept by night. In this compartment was a door leading to the strong room, which room had two iron doors opened by separate keys, which during the day were kept by the cashier who occupied the compartment. This cashier stole the securities. The bank received no consideration for taking care of the securities of their customers. Held, under the circumstances— That there was no evidence of negligence to render the bank liable for the loss.—*Tried in Privy Council, February*, 1869.— *From Law Journal Reports, Privy Council Cases, vol.* 38, *page* 25.

261. *Searle* v. *Laverick.*—Action for damage to carriages warehoused by a livery stable keeper. He had contracted with a builder to erect on part of his yard a building, of which the lower part was to be a shed intended for the reception of carriages, and the upper part to be used for other purposes. Two carriages and horses of the Plaintiff were placed under the shed when the lower part of the building had been completed; but whilst the contractor's workmen were still on the upper floor, the building was blown down by a high wind, and the carriages were injured. It was not disputed that the builder was one whom a careful and prudent person might trust, and that the Defendant had no notice of any negligence on the contractor's part; but it was proposed to prove that owing to the neglect of the contractor and his workmen the building was, in fact, unskilfully built and unsafe. The Judge at the trial ruled that the Defendant's liability was that of an ordinary

bailee for hire, and that all he was bound to do was to use ordinary care in the keeping of the Plaintiff's carriages; and that if, in causing the shed to be built, he did all that a careful man would do, he would be exempt from liability for an event which was caused by the carelessness or improper conduct of the builder, of which the Defendant had no notice. Held—That the direction was right, for it could not reasonably be inferred that the Defendant had warranted that the shed was fit for the purpose to which it was applied, inasmuch as this would charge him with a trust beyond what the nature of the thing put it in his power to perform; and although it was reasonable to require him to use due care to ascertain whether the building was secure, and, by himself and his servants, to take due care to maintain it in a proper state, it would be unreasonable to go further. Judgment for warehouseman.—*Tried in Court of Queen's Bench, January* 28, 1874.—*From Law Journal Reports, vol.* 43, *page* 43.

Where the Carrier's Liability Ends, and that of Warehouseman Commences.

(*See also cases of Fire, Goods Burnt, Stoppage in Transitu.*)

	Case No.		Case No.
Thomas v. *Day* (1803)	262	*Heugh* v. *L. & N. W.* (1870) ...	254
Cairns v. *Robins* (1841)	219	*Clough* v. *L. & N. W.* (1871) ...	134
Bolton v. *L. & Y.* (1866)	116	*Chapman* v. *G. W.* (1880)	191

DIGEST.

In *Thomas* v. *Day* (1803) a carrier was delivering to a warehouseman a pack of linen, and in hoisting it out of the cart up to the loft it fell out of the slings, and the linen was scattered out in the mud of the street. Lord Ellenborough said—"It appears here that the damaged pack of linen was on the crane and lifted from the cart; it was then in the warehouseman's possession, and being so, I think, in point of law, he is liable for the loss."

In *Cairns* v. *Robins* (1841) the goods were delivered to consignee, and he sent them back to the carrier's

warehouse to be warehoused, and at the end of a year, when he called for them, they could not be found. The carrier made no charge for warehousing, and his servant admitted he did it free, being compensated in getting the carriage. Baron Alderson said the question was whether the carrier was a gratuitous keeper of these goods, or a keeper of them for a reasonable compensation. He confirmed the verdict of the Jury that the carrier was liable.

In *Bolton* v. *Lancashire and Yorkshire* (1866) eight skips of twist were refused by consignee; he became a bankrupt, and then his assignee claimed them; sender in the meantime demanded and obtained possession of them from the Company. Consignee's assignee then sued the Company for value. Chief Justice Erle held that (although the goods had been sent backwards and forwards once or twice between consignee and sender) they had not ceased to be *in transitu*, and hence claimable by sender. He said—"A carrier may be a warehouseman of goods arrived at their destination, but to constitute him such there must be a change from the capacity of carrier to that of warehouseman, and that cannot take place unless the parties intend it. It is clear that consignee did not constitute the Company warehousemen; and then sender lays his hand on the goods, and that is a sufficient defence to this action."

In *Heugh* v. *London and North Western* (1870) a bale of duck was tendered to consignees, and, being refused, was taken back to the station. Consignee was served with a notice that the bale lay at his risk. One of consignee's men got possession of the notice, and fraudulently obtained delivery of the bale. Chief Baron Kelly said—"It is true that as a matter of law a delivery to the wrong person by *a carrier*, while he is still clothed with the character of a carrier, has been held to amount to a conversion. In this case the character of *carrier* had ceased when the delivery complained of took place, and whatever may have been the character which had then devolved upon the

Company, it certainly was not the character of carriers." Baron Martin said the Company were involuntary bailees and nothing else. Judgment for Company.

In *Clough* v. *London and North Western* (1871) nine pianos were sent, London to Liverpool. Senders, finding a fraud was intended, got the Company in London to telegraph to stop delivery of the pianos. Before the telegram arrived consignee had called at the Liverpool station, and *enough took place between him and the Company to put an end to the transitus, the Company agreeing with him to hold the pianos no longer as carriers, but as warehousemen for him.* Ultimately, on receiving an indemnity, the Company delivered the pianos to senders in London, and consignee sued for £205. The Company were held not liable, owing to the peculiar terms of the contract of sale between senders and the purchaser; but I must refer the reader to the Judgment, which cannot be condensed.

In *Chapman* v. *Great Western* (1880) goods arrived at Wimborne, addressed "Till called for," on March 25, and consignee did not apply for them until March 27, during which interval the station and the goods had been burnt. Lord Chief Justice Cockburn held that between the arrival and the fire a reasonable time had elapsed for consignee to have taken his goods away, and that he (consignee) could not prolong the liability of the carrier as a *carrier and insurer* beyond a reasonable time; that the carrier had become a warehouseman of the goods, and was not responsible for their accidental destruction by fire.

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262. *Thomas* v. *Day.*—Action for damage to a pack of linen during the course of being warehoused. Defendant kept a warehouse, and Plaintiff sent the pack to be warehoused. It appeared the damage arose in slinging the pack. It was slung on the crane by the cords, the cords gave way, and the pack fell, and 75 pieces of linen fell out in the street and were damaged by wet. The warehouseman offered the carter slings to make the hoisting more secure, but the carter refused them.

Lord Ellenborough said—"The whole question turned upon the single point, when the warehouseman's liability commenced and the agency of the carman ended. When the warehouseman took them into his own hands (was) the moment the warehouseman applied his tackle (of crane) to them; from that moment the carman's liability ceased. The slings are provided by the Defendant, and he is bound to see that they are of sufficient strength and fit for the purpose, and he should not apply his tackle (of crane) unless that could be performed which he was bound to do. If the slings were necessary the refusal of the carman or his declining to use them will not exempt the warehouseman. He ought to have insisted upon the carman using them, and if he refused he should have repudiated the goods and refused to accept them. It appears here that the damaged pack of linen was on the crane and lifted from the cart; it was then in Defendant's possession, and being so, I think, in point of law, he is liable for the loss."—*Tried at Nisi Prius, Hilary Term*, 1803.—*From Espinasse's Reports, vol.* 4, *page* 262.

WAREHOUSEMEN AND WHARFINGERS HAVE ORDINARILY (BY CUSTOM) A LIEN UPON GOODS FOR A GENERAL BALANCE.

	Case No.		Case No.
Naylor v. *Mangles* (1794)	263	*Spears* v. *Hartley* (1799)	264

DIGEST.

In *Naylor* v. *Mangles* (1794) Lord Kenyon said liens were either by common law, usage, or agreement. The usage in the present case had been proved so often that it should be considered as a settled point. Defendant had detained 25 hhds. sugar warehoused with him for part balance of a general account.

In *Spears* v. *Hartley* (1799) Defendant detained a log of mahogany (warehoused with him) for a general balance owing and unpaid for nine years. Lord Eldon held there was no statute of limitations in respect to a lien, and that the warehouseman may enforce payment

by the lien which the law has given him for his general balance.

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263. *Naylor* v. *Mangles.*—Action for £167. Defendant (Mangles) was a wharfinger and warehouseman, and had in his warehouse 25 hhds. sugar belonging to one Boyne. Boyne owed Mangles £167, part being for rent on the 25 hhds. sugar, and part balance of a general account. Boyne sold the sugar to Naylor (Plaintiff), but Mangles refused to deliver up the sugar until the whole of his account, £167, had been paid. Naylor, to get possession of the sugar, paid the £167, and brought this action to recover it back.

Lord Kenyon said liens were either by common law, usage, or agreement. Liens by common law were given where a party was obliged by law to receive goods, in which case, as the law imposed the burden, it also gave him the power of retaining for his indemnity. This was the case of innkeepers, who had by law such a lien. That a lien from usage was matter of evidence. The usage in the present case had been proved so often, he said it should be considered as a settled point that wharfingers had the lien contended for. Judgment for wharfinger.—*Tried at Nisi Prius, March* 3, 1794.—*From Espinasse's Reports, vol.* 1, *page* 109.

264. *Spears* v. *Hartley.*—Action for value of a log of mahogany. The Defendant, Hartley, detained the log as a lien for a general balance due some nine years previous, and which period of time was beyond the Statute of Limitations.

Lord Eldon said—"If what has been stated by Plaintiff's counsel be law, that the debt is *discharged* by the operation of the Statute of Limitations, no lien could be obtained by reason of it; but the debt was not discharged, it was the remedy only. I am of opinion that though the Statute of Limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien. In this case Defendant had a subsisting demand when the goods came to his possession. I am of opinion he may enforce it by the lien which the law has given him for his general balance." Judgment for ware-

houseman.—*Tried in Court of Common Pleas, February* 19, 1799.—*From Espinasse's Reports, vol.* 3, *page* 81.

WAREHOUSEMAN'S RESPONSIBILITY IN RESPECT TO ACCIDENTAL FIRE DESTROYING THE GOODS—DAMAGE BY RATS AND MICE AND LEAKAGE.

	Case No.		Case No.
Story on Bailments, 536 *and* 537	—	*Bourne* v. *Gatliffe* (1844)	220
Gartside v. *T. & M. N.* (1792) ...	241	*White* v. *Humphrey* (1847)... ...	200
Cailiff v. *Danvers* (1792)	265	*Hudson* v. *Baxendale* (1857) ...	225
Hyde v. *T. & M. N.* (1793) ...	214	*Chapman* v. *Great Western* (1880)	191
In re Webb (1818)	266		

DIGEST.

In *Story on Bailments, section* 536, *page* 519, it is stated—"In all cases the material point upon which the controversy hinges is whether the one character or the other character predominates in the particular stage of the transaction. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier begins with the receipt of the goods. So if an innkeeper is at the same time a carrier, and goods are sent to his inn and received by him for transportation, he is liable as a carrier for any loss before they are put upon their transit."

In *Story on Bailments, section* 537, *page* 519, it is stated—"On the other hand, if a person is at the same time a common carrier and a forwarding merchant, and he receives goods into his warehouse to be forwarded according to the future orders of the owners, if the goods are lost by fire before such orders are received or the goods are put in transit, he is not chargeable as a common carrier, but only as a warehouseman."

In *Gartside* v. *Trent and Mersey Navigation* (1792) four pockets hops were carried from Stourport to Manchester by canal, to go to Stockport. The hops were burnt in canal warehouse the first night after discharge. It was the custom to keep the goods in the warehouse until the Stockport carrier called for them. The carrier was held exempt from liability for the destruction of the hops, being held to be a warehouseman, and holding the goods until the proper carrier called for them.

In *Cailiff* v. *Danvers* (1792) ginseng in a box was destroyed by rats. Plaintiff had several times taken

samples, and had not nailed the cover down. The carrier kept cats in the warehouse to destroy the rats. Lord Kenyon held that the Defendant, having exerted all due and common diligence, was not responsible, not being an insurer, as he would have been under a carrier's contract.

In *Hyde* v. *Trent Navigation Company* (1793) eighteen bales of cotton were burned in the Manchester Canal warehouse the same night as unloaded from boat. The Canal Company had accepted at the starting point (Gainsborough) the freight, and also a sum for cartage in Manchester. The Company gave the cartage to a cartage agent, and paid him, but denied acceptance of a through contract to deliver beyond their warehouse in Manchester. Chief Justice Lord Kenyon held that the cotton, when burnt, was in the Company's hands as common carriers and not as warehousemen, and that they were responsible for the through delivery to consignee's warehouse.

In *Re Webb* (1818) wool that had been carried by road, London to Frome, was at consignee's request retained in the carrier's warehouse, where it was accidentally burnt. Chief Justice Gibbs held, although the duty of the carrier had not been discharged, he was not liable as a carrier under the circumstances for the loss.

In *Bourne* v. *Gatliffe* (1844) linens, value £734, Belfast to London, were burnt the night of the day of unloading on the wharf at London. It was proved to have been the practice of the carrier to deliver to consignee's warehouse in the City; hence the responsibility of the carrier had not ceased by his conversion into a warehouseman, and he was held liable for the loss.

In *White* v. *Humphrey* (1847) four tons of hops were damaged by mice in carrier's warehouse at Maidstone. They were on hand for thirteen months, but had been received by the carrier to at some time carry, and were carried, to London. No charge for warehouse rent was made. Lord Denman held that the advantage of carrying the hops for hire might be considered as pay-

ment for storage, and the carrier was therefore not a gratuitous warehouseman, and consequently liable for the damage.

In *Hudson* v. *Baxendale* (1857) a puncheon of gin was refused by consignee because he did not order it. It was then leaky at the bung. It lay in the carrier's warehouse nearly three months, when 25 gallons were found deficient. It was held that after the carrier had tendered the puncheon to consignee, and the consignee had said "I will not take it," then he was no longer an insurer, and his duty as a carrier had ceased, and a totally different duty was cast upon him; that the carrier was not responsible for the leakage if it occurred after the tender, nor if the leakage arose from the original vice in the packing, nor was he responsible to advise sender of the refusal.

In *Chapman* v. *Great Western* (1880) goods arrived at Wimborne, addressed "Till called for," on March 25, and consignee did not apply for them until March 27, during which interval the station and the goods had been burnt. Lord Chief Justice Cockburn held that between the arrival and the fire a reasonable time had elapsed for consignee to have taken his goods away, and that he (consignee) could not prolong the liability of the carrier as *a carrier and insurer* beyond a reasonable time; that the carrier had become a warehouseman of the goods, and was not responsible for their accidental destruction by fire.

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265. *Cailiff* v. *Danvers.*—Action for destruction of a box of ginseng by rats. Defendant, a warehouseman, had the box deposited in his warehouse by Plaintiff. Plaintiff on several occasions opened the box to take samples of the ginseng, and, although the cover was put down, it was not nailed down. Many cats were kept, and all efforts made to destroy vermin.

Lord Kenyon said that a warehouseman was only obliged to exert reasonable diligence in taking care of the things deposited in his warehouse; that he was not, like a carrier, to be considered as an insurer and liable for all losses happening other-

wise than by act of God or the King's enemies; and that the Defendant in the present case, having exerted all due and common diligence for the preservation of the commodity, was not liable to any action for this damage, which he could not prevent. Judgment for warehouseman.—*Tried in Court of Nisi Prius, March* 1, 1792.—*From Peake's Nisi Prius Reports, vol.* 1, *page* 155.

266. *In re Webb.*—Action for £633, the value of wool burnt accidentally in a carrier's warehouse. The wool was carted by road from London to Frome, and retained at the request of consignees (Shepherd & Co.) in Webb's (the carrier's) warehouse. No charge was made for warehouse rent. The carrier, however, had a fire insurance policy of £500 on the warehouse and its contents, which he duly recovered.

Chief Justice Gibbs held—"That the character of Webb and Co. was suspended from the time of the arrival of the wool at Frome until their delivery to the consignees; and that during such interval, though the duty of Webb and Co. as carriers was not discharged, they were not liable as carriers."—*Tried in Court of Common Pleas, June* 5, 1818.—*From Taunton's Reports, vol.* 8, *page* 443.

WHERE A TENDER OF THE GOODS HAD BEEN MADE AND THEY WERE BROUGHT BACK TO CARRIER'S WAREHOUSE, YET HE WAS HELD LIABLE AS A CARRIER.

	Case No.		Case No.
Storr v. *Crowley* (1825)	226	*Bolton* v. *L. & Y.* (1866)	116

DIGEST.

In *Storr* v. *Crowley* (1825) a hamper was delivered at consignee's house, and his wife having no money to pay carriage, the porter took the hamper back to the wharf. Consignee's servant the same day called at the wharf and asked the porter to re-deliver the hamper, and he agreed to do so next day. Chief Baron Alexander held that this act of the servant and the porter was the commencement of an undertaking on the part of

the carrier to waive all the benefit which might be derived from the previous tender, and there was a continuing contract to find out the person to whom the goods were consigned, and to deliver them.

In *Bolton* v. *L. & Y.* (1866) consignee had refused to accept some skips of twist, but one day his carter took four of the skips home from the station in error. They were, however, at once brought back. Chief Justice Erle said—"The goods delivered at Brierfield Station to his mill were delivered contrary to his instructions by his carter, and it was the same as if a wrongdoer had taken them and then they had been brought back."

MEASURE OF DAMAGES FOR GOODS LOST OR MISDELIVERED BY A WAREHOUSEMAN.

	Case No.		Case No.
Anderson v. *N. E.* (1861)	438	*Hiort* v. *L. & N. W.* (1879) ...	239

DIGEST.

In *Anderson* v. *North Eastern* (1861) a case traveller's patterns was lost from a left luggage office, and Plaintiff claimed salary and expenses during fifteen days which it took to replace the patterns. The Court held a warehouseman cannot be held liable for consequential damages beyond the value of the article. Baron Bramwell said—"There would be no possibility of defining their responsibility if we were to hold that their (warehousemen's) liability varied with the consequences collaterally resulting from the loss of such parcels."

In *Hiort* v. *L. & N. W.* (1879) some oats were consigned to order, and the Company delivered the oats without a proper transfer order, which, however, was lodged with them five days afterwards. The Court of Appeal held that during these five days the Company had deprived the owner of his goods, and that this constituted a technical conversion, and gave damages, 1s., against the Company.

CONSIGNEE ADVISED OF GOODS BEING ON HAND AND HELD UNDER WAREHOUSEMAN'S LIABILITY AT OWNER'S RISK.

	Case No.
Mitchell v. *L. & Y.* (1875)	196

DIGEST.

In *Mitchell* v. *Lancashire and Yorkshire* (1875) bags flax, not being removed from station, were stacked in open air and covered by a tarpaulin, and consignee was advised they were held by Company under the liability of warehousemen at owner's risk. The flax got wet, and was refused, and the Company were sued for loss. Justice Blackburn said—"When the goods arrived at their destination the Company complied with their duty when they gave notice, and then they ceased to be carriers, and incurred from that time a liability as warehousemen. I do not know of any case that supports the proposition that where the owner is in delay in removing the goods the warehouseman in consequence holds himself discharged from all responsibility. It seems to me unreasonable to construe the terms of the advice note as meaning that the Company should hold the goods for the benefit of receiving rent for warehousing them, and without any liability whatever, except that they must not convert, or sell, or steal them; they need not take any care about them."

THE WAREHOUSEMAN IS NOT AN INSURER—HE RECEIVES GOODS ON A SPECIAL CONTRACT MADE BETWEEN HIMSELF AND HIS CUSTOMERS.

	Case No.		Case No.
Van Toll v. *South Eastern* (1862)	440	*Mitchell* v. *L. & Y.* (1875)... ...	196
Henderson v. *Stevenson* (1875) ...	447	*Harris* v. *Great Western* (1876)	442

DIGEST.

In *Van Toll* v. *South Eastern* (1862) Chief Justice Erle said—"In a contract for bailment (taking charge)

the bailee may impose whatever terms he chooses, if he gives notice of them, and the bailor has the means of knowing them; and if he chooses to make the bailment he is bound by them. The reasonableness of the terms is an irrelevant inquiry, the parties being at liberty to choose their own terms."

In *Henderson* v. *Stevenson* (1875) is illustrated the importance of bringing home to the person making the contract with the warehouseman the conditions of the contract. The Lord Chancellor in this case said that it would be extremely dangerous to hold that where a document (ticket) is complete on the face of it, but having on the back of it something which has not been brought to the knowledge of a contracting party, he should be held to have assented to that which he has not seen, and of which he knows nothing. There was nothing on the face of the ticket referring Plaintiff to the back.

In *Mitchell* v. *Lancashire and Yorkshire* (1875) bales of flax, after completion of carriage contract, were held for consignee, and were stacked in station yard, covered with tarpaulins, but no timber had been put under the bales to keep them off the ground, and the flax was damaged by wet. Judge Field said—"I find in advice note these words, 'At owner's sole risk,' following affirmative words which describe the Company's liability. It is that of holders of goods under the known definition of warehousemen making a warehouseman's charge. Under these circumstances I cannot read these words as freeing the Company from the ordinary liability to take reasonable care."

In *Harris* v. *Great Western* (1876) Judge Blackburn said—"The ticket has on the face of it a plain and unequivocal reference to the conditions printed on the back of it, and any person who read that reference could, without difficulty, look at the back and see what the conditions were. The Company would, if the left luggage were under £5 (the notice as to value being £5) in value, be, in my opinion, liable, not

because they were placed in the vestibule, but because they took no care of them when there."

CLOAK ROOM—DEPOSITS OF LUGGAGE.

	Case No.		Case No.
Anderson v. *North Eastern* (1861)	438	*Van Toll* v. *South Eastern* (1862)	440

DIGEST.

In *Anderson* v. *North Eastern* (1861) a case of traveller's patterns was lost out of cloak room, and it took fifteen days to replace them. Company were sued as *warehousemen* for £57 for patterns, case, salary, and expenses. Chief Baron Pollock held the Company to be bailees (not exactly warehousemen), responsible for loss to the amount of the value, but there was no undertaking to be answerable beyond the value, except by special contract. Consequential damages are not recoverable.

In *Van Toll* v. *South Eastern* (1862) a bag for a time could not be traced, and when found £20 worth of jewellery had been stolen therefrom. Chief Justice Erle held the case did not come under the 17 and 18 Vic., cap. 31, sec. 7, which regulates the terms a railway company may make for receiving, forwarding, and delivering goods. "The Company did not receive the bag in the capacity of carriers. It was a contract for bailment, and the reasonableness of the terms is an irrelevant inquiry, the parties being at liberty to choose their own terms. Plaintiff was bound by the notice of conditions exhibited at the cloak room and on the ticket." Judgment for Company.

UNDUE PREFERENCE

AND

CARTING AGENTS' CASES.

GENERAL.

	Case No.		Case No.
Robins (ex parte) v. *L. & B.* (1839)	267	*Jones* v. *E. C.* (1858)	405
Burton v. *G. N.* (1854)	268	*Bennett* v. *M. S. & L.* (1859) ...	270
Hozier v. *Cal.* (1855)	404	*Att.-Gen.* v. *G. N.* (1860)	271
Cooper v. *L. & S. W.* (1858) ..	269	*Pickford* v. *Cal.* (1866)	310

DIGEST.

In *Ex parte Robins* (v. *London and B.*) (1839) it was held that a company could not be required to cease undue preference by seeking to obtain a mandamus against them; the proceeding must be by common law.

In *Burton* v. *Great Northern* (1854) Plaintiff was employed, on an agreement for twelve months, to cart grain, Hatfield to Ware, for 5s. per ton, and he was to provide horses, waggons, drivers, and tarpaulins. It appeared it became unnecessary to cart any corn, so none was presented, and the Court held there had been no breach of the contract.

In *Hozier* v. *Caledonian* (1855) Plaintiff's complaint was that the fares for passengers between Motherwell and Edinburgh were greatly in excess and out of proportion to the fares, Motherwell to Glasgow, and he wished the fares altered. Lord President M'Neil gave Judgment for the Company.

In *Cooper* v. *London and South Western* (1858) it was held in the Court of Common Pleas that a railway company unloading "station to station" goods for

one person can be required to do so for all persons, or it would constitute undue preference.

In *Jones* v. *Eastern Counties* (1858) Plaintiff complained that the Company would not issue return season tickets between Colchester and London on the same terms as they issued them between Harwich and London. The Court declined to hold this to be undue preference.

In *Bennett* v. *Manchester Sheffield and Lincolnshire* (1859) it was stated the Company had two docks at Grimsby, the Old and the New Dock. The complaint was the Company allowed the old dock to get silted up so as to force the public to use the new dock, and that this was undue preference. The Court gave Judgment for the Company. Justice Byles said the Act refers to preferences given to one person or class of persons over another in the traffic along the same railway or canal.

In *The Attorney-General* v. *Great Northern* (1860) it was decided in Chancery that the Company could not trade in coal or any other commodities, as it would give rise to undue preference.

In *Pickford* v. *Caledonian* (1866) the Plaintiff complained he had not room at the Company's Glasgow Station to sort his goods for delivery same as had Cameron & Co., the Company's agent. Lord Justice Clerk held in favour of the Company. Plaintiff complained of not being allowed a monthly ledger account, and the Judgment was in favour of the Company. Plaintiff complained that his clerk was not allowed a writing sentry-box like Cameron & Co.; the Judgment was again in favour of the Company.

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267. *Ex parte Robins* (v. *London and Birmingham Railway Company*).—Action in respect to railway company refusing to carry goods. Messrs. Robins, carriers, applied to the London and Birmingham Railway to have their goods carried in the Company's carriages. This the Company refused, although the Company had entered into arrangements with another firm of

carriers to convey their goods only. Messrs. Robins applied for a mandamus.

Justice Patteson said—"A mandamus, if granted at all, must be to do something which the Company are required to do by the Act of Parliament, not something which they are required to do by the general law of the land. Now it is admitted that there is no clause in the Act requiring the Company to take the goods of all persons who present them for conveyance in the carriages of the Company, and indeed the Act seems rather to negative such an obligation. The 171st section authorises all persons to use the railway with carriages properly constructed on payment of certain rates, and it seems, therefore, that the present applicants may make carriages of their own, and may require the Company to allow them to be conveyed along the railroad. By the 174th section the Company are *empowered*, not *required*, to provide locomotive engines or other power for drawing things along the railway, and may recover such sums of money for the use of them as they think proper, in addition to the other rates authorised to be taken. It seems, therefore, that it was not intended by the Act to compel the Company to take all goods of all persons which might be offered to be conveyed. The argument next is that the Company have held themselves out to the world as common carriers, and that therefore they are within the general law, and are obliged in consequence to carry all goods if they have room and means, and that therefore they have no right to do so great an injury to one set of carriers as to refuse their goods and to take the goods of others. It is argued that that cannot be done by the general law of the land, but a breach of the general law of the land is the subject of an action. The Court will never grant a mandamus to enforce the general law of the land which may be enforced by an action. They will, however, in some cases grant a mandamus to do that which may be enforced by indictment, as was determined in the cases that have been cited, of which I see the full force." Judgment in favour of Company.—*Tried in Court of Queen's Bench, Hilary Term*, 1839.—*From Dowling's Reports, vol.* 7, *page* 566.

268. *Burton* v. *Great Northern Railway Company.*—Action for damages owing to an alleged breach of a cartage

contract. The contract was made on the 1st October, 1851, and the Company ceased to give Plaintiff the goods to carry on the 1st April, 1852, giving him notice on the 18th April, 1852. The cartage was between Hatfield and Ware for grain and merchandise, at 5s. per ton. It appeared to be competitive traffic with the Eastern Counties Railway. An arrangement was made between the two Railway Companies, and Plaintiff's services, owing to the traffic being diverted, were not then required. The agreement set out—

"Thomas Burton undertakes, in consideration of the terms hereinafter recited, to provide all waggons, horses, drivers, tarpaulins, and all other plant necessary for the cartage of grain, merchandise, &c., between Hatfield and Ware, and to convey all grain, merchandise, &c., that *may be presented to him* for that purpose, between the above points." "And it is mutually agreed that this agreement shall continue in force for the period of twelve months from the date hereof; at the expiration of such time, Mr. Burton will have the option of continuing the contract on such reduced terms as any other party may undertake the work."

The case was first tried at the London Sittings after Michaelmas, 1853, before Baron Martin, when he told the Jury he thought there was an agreement; that the declaration might be amended if requisite; and that the Company had been guilty of a breach of contract, because the necessary result of their act was the termination of the employment of the Plaintiff. Verdict, £75 damages. The Company appealed, and on the appeal case Baron Parke said—"The Plaintiff undertakes, in consideration of the payment specified, to carry all the goods that may be presented, and it turns out that there is no occasion for any to be presented. What breach is there? There is no provision that a given quantity shall be sent. The contention is that by giving the notice the Company have committed a breach. The contract, as laid down in the declaration, is certainly not proved, and I do not at present see what amendment could be made to support the action. If it be alleged that the Company were to pay for all goods that should be presented and carried within the year, there is then no breach. There may be a new trial, with liberty to the parties to amend if it is thought worth while to do so." A *stet processus* was agreed to.—*Tried in Court of Exchequer, February* 7, 1854.—*From Law Journal Reports, vol.* 23, *page* 184.

269. *Charles C. Cooper* v. *London and South Western Railway Company.*—Action in respect of undue preference under Railway and Canal Act (17 & 18 Vic., cap. 31). Plaintiff, an independent carting agent, and previously an employee of the Company, received goods consigned to him from Southampton Docks to Nine Elms Station, London. These goods were charged 13s. per ton, which Plaintiff alleged was second class rate. The Company loaded them in separate waggons from other traffic (it appeared the quantity being sufficient), but the Company refused at Nine Elms to unload the goods, but placed the waggons convenient for Plaintiff to do so. Plaintiff contended that goods arrived from Southampton Docks for Pickford & Company, and that the Company unloaded these. The Company replied that Pickford & Company's goods were received in very much less quantities, and from this fact were loaded with the Company's general goods, and in unloading these general goods they necessarily had to take out those belonging to Pickford & Company. The Company's superintendent made an affidavit that the 13s. rate was a station to station rate, and did not include the service of unloading. It appeared the Plaintiff had not made a demand upon the Company to be treated the same as Pickford & Co., and that consequently the rule before the Court had not been properly *moulded.* Chief Justice Cockburn considered that "the greivance is one only of small amount. The rule, therefore, must be discharged, but without costs, and with an intimation from the Court that the Company are not justified in their present course of proceeding, and that if they continue it this Court will probably interfere."—*Tried at Court of Common Pleas, June* 1, 1858.—*Law Journal Reports, vol.* 27, *page* 324.

270.—*Bennett* v. *Manchester Sheffield and Lincolnshire Railway Company.*—Action against a railway company for not keeping a dock by the depth of water in a fit condition for traffic. The Manchester Sheffield and Lincolnshire Company were the proprietors of the Grimsby Old Dock, and also of another dock called the Grimsby New Dock, communicating with their railway. By Act of Parliament the Company were authorised and required to maintain the old dock and the

approach thereto of a given depth. Held—That the failure to perform this duty, so that the dock and its approaches became silted up and the depth of water therein insufficient for vessels to get to the wharfs adjoining, was not the subject of redress under the Railway and Canal Traffic Act, 1854, although it was suggested that the object of the Company was to discourage the traffic to the old dock, and to divert it to the new. And *semble*—that the dock or haven was not a canal or navigation within the statute. *Per* Justice Byles—The Act refers to preferences given to one person or class of persons over another in the traffic along the same railway or canal. Judgment for Company.—*Tried in Court of Common Pleas, June* 15, 1859. —*From Neville and Macnamara's Reports, vol.* 1, *page* 288.

271.—*The Attorney-General* v. *Great Northern Railway Company.*—The Attorney-General, at the instance of a Mr. North, of Nottingham, applied for an injunction in Chancery to compel the Great Northern Railway to desist from acting as dealers in coal, which they carried to London and sold. Vice-Chancellor Kindersley said he could not conceive the slightest doubt but that in effect the Company had become dealers in coal. "The Company's Act contains no express prohibition against engaging in any business, except that of making and maintaining and using the railway; there is, however, implied in every such Act a prohibition or contract against ever engaging in any other business than that of a railway company. It is therefore illegal, and in effect, though not in terms, prohibited by the law to a railway company. Railway companies are armed with powers of raising and possessing large sums of money, large amounts of property; and if they were to apply that money or that property to purposes other than those for which they were constituted, they might very much injure the interests of the public. I observe that in the eight years, 1852 to 1857, the Company's coal business increased from 73,000 tons to 794,000 tons. There is great danger they might get into their hands the entire business in coal of all that district of country. If with coal, why not with other produce, as corn, beasts, sheep, &c.? Other railway companies might do the same, and three or four companies would have a monopoly of

the coal trade into London." Judgment against Company.—*Tried in Vice-Chancellor's Court, June* 25, 1860.

Undue Preference in respect to Rates for Carriage of Coal, Slates, and Minerals.

	Case No.
Equality Clause, 8 & 9 *Vic., cap.* 20, *sec.* 90, *page* 486	—
Oxlade v. *North Eastern* (1857)	272
Ransome v. *E C.* (1857)	273
Ransome v. *E. C.* (1858)	274
Ransome v. *E. C.* (1858)	275
Harris v. *C. & W.* (1858)	276
Nicholson v. *G. W.* (1858)... ...	277
Ransome v. *E. C.* (1860)	278
Oxlade v. *North Eastern* (1864)	279
Strick v. *Swansea Canal Co.* (1864)	367
West v. *L. & N. W.* (1870)... ...	280
Nittshill Coal v. *Caledonian* (1874)	281
Diphwys Casson v. *Festiniog* (1874)	282
Lees v. *L. & Y.* (1874)...	283
Foreman v. *Great Eastern* (1875)	284
Bellsdyke v. *North British* (1875)	285
Holland v. *Festiniog* (1876) ...	286
Victoria Coal v. *N. & B.* (1877)	287
Lock v. *North Eastern* (1877)! ...	288
Lloyd v. *N. & B.* (1878)	289

DIGEST.

In *Oxlade* v. *North Eastern* (1857) Plaintiff complained that coal in train-loads was carried at a less rate per ton per mile to South Staffordshire than for shorter distances on the local system of the North Eastern Company's line. Justice Cresswell held that a railway company is justified in carrying goods for one person at a less rate than that at which they carry the same description of goods for another, if there be circumstances which render the cost to the Company of carrying for the former less than the cost of carrying for the latter.

In *Ransome* v. *Eastern Counties* (1857) Plaintiff complained the Company had contrived rates designed to give traders of land-borne coal *via* Peterborough an advantage over sea-borne coal imported into Ipswich and sent to interior stations. Justice Cresswell held that in construing the Act the interests of the Company might be considered, and if 1,000 tons could be carried at less than 100 tons, yielding an equal profit to the Company, it was competent for the Company to charge

a lower rate per ton per mile. Still, a writ was issued that no undue preference should be given in favour of Prior & Co., the rival coal firm.

In *Nicholson* v. *Great Western* (1858) the Company, by agreement for ten years, granted the Ruabon Coal Company a low rate for coal in train-loads, in such quantity as to produce to the Company £40,000 a year. The Company offered the same facility to other senders on same terms. The Court's construction of the 17 & 18 Vic., cap. 31, is not contravened by the Company carrying at a different rate (lower rate) in consideration of a guarantee of a large quantity of full train-loads at regular periods, provided the real object of the Railway Company be to obtain a greater remunerative profit by a diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such guarantee. Judgment for Company.

In *Harris* v. *Cockermouth and Workington* (1858) the Company was threatened by Lord Lonsdale that he would make a tramway to Workington and divert his coal trade, and to prevent this the Company granted him a lower rate than other colliery proprietors. The Court of Common Pleas held this to be undue preference within 17 & 18 Vic., cap. 31, sec. 2.

In *Ransome* v. *Eastern Counties* (1858) Plaintiff complained that the Company had contrived rates designed to give the traders of land-borne coal *via* Peterborough an advantage over sea-borne coal imported into Ipswich and sent to interior stations. Held—That the Company could grant lower rates for full train loads of coal without undue preference. Plaintiff also complained that the rates for *train-loads* from Peterborough are out of all proportion greater than the rates from Ipswich for *train-loads*. Held—That there was undue preference, the points being competitive, and the rates for the longer distances proportionately lower.

In *Ransome* v. *Eastern Counties* (Easter Term, 1858) the complaint was that the Company had not obeyed a

writ of injunction issued after the previous trial. Justice Willes said—"The Plaintiff has failed to make out that the cost, with the mileage (which is admitted to be correctly charged), would make a tonnage rate less than the charges of which they complain. Unless they establish this—and they certainly have not done so—they have no *locus standi*, and consequently must bear the usual penalty of an unsuccessful experiment by having their rule discharged, with costs.

In *Ransome* v. *Eastern Counties* (1860), where coal is carried in train-loads at a lower rate, it was held that a company dividing a train owing to steep inclines does not make a low rate, in train-loads, a case of undue preference.

In *Oxlade* v. *North Eastern* (1864) the Company declined to carry coal for individuals, and confined the carriage to colliery owners. Chief Justice Erle said—"I think the Company have a perfect right to say that they will carry coal only for colliery owners. For the reasons alleged by them in their affidavits, it is evident that they could not have the same control over the traffic if they carried coal for the general public."

In *Strick* v. *Swansea Canal Company* (1864) the Plaintiff complained he was charged for coal on the canal for three and a half miles at 1½d. per ton per mile, while other persons carrying coal a greater distance were charged only ¾d. per ton per mile. Chief Justice Erle ruled in favour of the Canal Company.

In *West* v. *London and North Western* (1870) Plaintiff complained that the Company had rented to one Perkins the whole of the land adjoining the station for a coal wharf, and refused to rent him ground for a similar purpose, and that Perkins did not occupy or require all the ground. Two Judges held the wharf was part of the railway, and the case came within the Railway and Canal Act. The other two Judges held the application was for a store for the deposit and sale of coal, and the statute did not apply. Rule dropped.

In *Lees* v. *Lancashire and Yorkshire* (1874) the Railway Company had to close their Oldham Road Station, Manchester, for the reception of coal, and transfer the trade to Miles Platting Station. Plaintiffs and the Corporation of Manchester both had sidings off the Oldham Road Station into their own yards. Plaintiffs sold the coal by retail, while the Corporation only used it for making gas. The Company declined to continue to carry Plaintiffs' coal to Oldham Road, but continued to carry the coal for gas. The Court of Railway Commission held that it was a matter of public benefit and convenience to continue carrying the Corporation coal, and that it was not undue and unreasonable preference.

In *Nittshill Coal Company* v. *Caledonian* (1874) the Plaintiffs were charged a higher rate because their coal was cannel coal for gas purposes. The Company carried splint coal, which was also used for gas purposes, at the lower rate. Held—That this was undue preference, as cannel coal and splint coal had enough in common of gas-producing quality to be commercially the same description.

In *Diphwys Casson Slate Company* v. *Festiniog Railway* (1874-75) the Company entered into an agreement with a Mr. Greaves to carry his slates for fourteen years at 2s. 6d. per ton, instead of the ordinary rate, 3s. 3d. per ton, the consideration being that Mr. Greaves bound himself to send all his slates by the line to Portmadoc. Same terms were offered to other senders. The Court of Railway Commissioners held—"The Railway Company cannot compel the public to purchase equality of treatment by imposing conditions of the character of those contained in the agreement. The same offer may be made to all, but circumstances are so unlike that every kind of partiality would ensue if the offer must be accepted or parties submit to higher charges." Judgment against Company.

In *Bellsdyke* v. *North British* (1875) lower rates for carriage of coal had been given to one colliery pro-

prietor over others, and the Railway Commission held it was undue preference, and must be discontinued.

In *Foreman* v. *Great Eastern* (1875) the old question tried in *Ransome* v. *Eastern Counties* came up again to be tried before the Railway Commission. The rates for sea-borne coal into Great Yarmouth for interior stations were relatively higher than the rates for land-borne coal from Peterborough to same stations. The decision was against the Company, and further, they were required to give Plaintiff certain accommodation at Great Yarmouth to load coal from quay side into trucks.

In *Holland* v. *Festiniog Company* (1876) the Company made agreements with two quarry owners for special rates, one agreement for fourteen years, and the other for thirty years. The rate for the thirty years' agreement was a less rate of 4½d. per ton. This was held to be undue preference.

In *Victoria Coal and Iron Company* v. *Neath and Brecon and Midland Railways* (1877) the lines of the two Defendants formed a continuous and direct line from Plaintiffs' colliery to Swansea. The Defendants, however, refused to carry the coal by this direct line. The Court of Railway Commissioners held that under section 2, Railway and Canal Act, 1854, the Companies must carry the coal.

In *Lock* v. *North Eastern* (1877) the Company allotted at many stations cells or depots to certain colliery owners to store their coal and to retail it. Private persons receiving coal at these stations had no such continued convenience, and this was held to be undue preference.

In *Lloyd* v. *Northampton and Banbury Company* (1878) it was a question of two ironstone mines. One mine was three and a half miles from Blisworth and the other two and a half miles further, and Plaintiff objected to the two being grouped and the same rates charged to South Wales. The Court of Railway Commission held

that no undue preference was caused by the same rate being made applicable to both places; that, as a through rate was a gross sum of several amounts for conveyance over a long route, it was impossible to make its amount vary with slight differences of distance.

Equality Clause, 8 & 9 *Vic., cap.* 20, *sec.* 90.—"And whereas it is expedient that the Company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly either in the hands of the Company or of particular parties, it shall be lawful, therefore, for the Company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken either upon the whole or upon any particular portions of the railway as they shall think fit: provided that all such tolls be at all times charged equally to all persons and after the same rate, whether *per* ton or *per* mile or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular Company or person travelling upon or using the railway."

272.—*Oxlade* v. *North Eastern Railway Company.*—Action in respect to undue preference in the carriage of coal from Durham and Northumberland. Plaintiff sent coal and coke from the collieries on the North Eastern Railway to South Staffordshire. From some cause the North Eastern waggons were detained beyond the four days allowed, and the South Staffordshire Company, being unable to collect the demurrage, refused to accept any more traffic for Plaintiff. The North Eastern Railway, being the sending Company, consequently gave Plaintiff notice accordingly. Plaintiff then commenced this action against the North Eastern for undue preference, inasmuch as coal in train-loads were carried at a less rate per ton per mile to South Staffordshire than for shorter distances on the local system of the North Eastern Railway. The North Eastern Company proved that the lower rates were only granted when large fixed quantities were sent within a fixed time.

Justice Cresswell held—That a railway is justified in carrying goods for one person at a less rate than that at which they carry the same description of goods for another, if there

be circumstances which render the cost to the Company of carrying for the former less than the cost of carrying for the latter.

The North Eastern Railway Company, from a desire to introduce the Northern coal into Staffordshire, were induced to make special agreements with different merchants for the carriage of coal and coke at a lower rate than their ordinary charge. Held—That this was not a legitimate ground for making such agreements, and that lowering their rates for that purpose, there being nothing to show that the pecuniary interests of the Company were affected, was giving an undue preference to that traffic.

The Court refused to require the Company to provide trucks for the carriage of coal and coke for a merchant who refused to pay demurrage therefor at the same rate as was charged to all other merchants under similar circumstances, or to carry coals to the extremity of their line, where it joined the Midland Railway (Altofts, near Normanton), and there shift them into other trucks or waggons, they having no convenience at that place for that purpose, and not affording such facility to any other person. And as to the first branch of the rule, held—That the Company were not common carriers of coal.

The view of the Railway and Canal Traffic Act, 1854, expressed in *Ransome* v. *Eastern Counties Railway* acted upon.—*Tried in Court of Common Pleas, January* 30, 1857.—*From Neville and Macnamara's Reports, vol.* 1, *page* 72.

273. *Ransome* v. *Eastern Counties Railway Company.*—Action in respect to undue preference. The Company carried coal for Messrs. Prior from Peterborough to their stations at a less rate per ton per mile than they would consent to carry coal for Messrs. Ransome from Ipswich to the interior stations. In fact it was a case of competition between land-borne coal and sea-borne coal. It would appear that the Company were anxious to encourage the longer mileage traffic from Peterborough rather than the shorter mileage traffic on sea-borne coal from Ipswich inland.

Justice Cresswell said—"The first thing to be ascertained is the meaning of the expressions in the Act, 'undue or unrea-

sonable preference or advantage,' and 'undue or unreasonable prejudice or disadvantage.' Are these words to be construed with reference to the interests of all parties using the railway, or may the interests of the railway owners be taken in any manner into account? If a thousand tons could be carried at a lower sum per ton per mile than one hundred, yielding an equal profit to the Railway Company, may they so regulate the charge as to derive such equal profit? If that can be done without giving what the statute calls an undue or unreasonable preference, may not the Company, in fixing the rates, consider the whole profit, and not the mere profit per mile, and, in order to induce people to carry more on their line, and for longer distances, agree to make a reduction in each case? If two railways start from the same terminus, and arrive at the same terminus by different routes, must they charge for the whole line at the same rate as the intermediate stations? After a good deal of consideration, we think that the fair interests of the railway ought to be taken into account, and then the questions above suggested assume a very complicated and difficult character, and are such as we feel but little qualified to decide. We cannot say both parties should be charged the same sum per ton per mile, for Prior & Co. use their own trucks, and Ransome & Co. use the trucks of the Company; and it is possible it may cost the Railway Company more to carry it over some parts of the line than others. We cannot prescribe an equal mileage rate without making some allowance for trucks, and for the same reason we cannot enjoin the Company to desist from charging Ransome & Co. any greater sum per ton per mile than they charge to persons with whom they have private agreements. We think that a writ should issue enjoining the Company to desist from giving any undue preference to Prior & Co., and to carry coals for Ransome & Co. on equal terms with Prior & Co., having due regard to the circumstances, if any, which render the cost of the Company less in carrying for one party than it costs in carrying for another."—*Tried in the Court of Common Pleas, January* 22 *and* 29, 1857.—*From Law Journal Reports, vol.* 26, *page* 91.

274. *Ransome* v. *Eastern Counties Railway Company.*—Action in respect to undue preference in the rates for coal traffic.

The Court refused to grant an attachment against the Company for disobedience to a writ of injunction under the Railway and Canal Act, 1854, enjoining them to desist from giving an undue preference in respect of the carriage of coal to persons carrying coal from Peterborough or other places to or towards certain places mentioned in the rule, the affidavits on the part of the Company showing a *bonâ fide* endeavour on their part to conform to the order of the Court, although it appeared that the reformed scale of charges still operated in some other respects injuriously to the interests of the Complainants and advantageously to the other parties.

Justice Willes said—"Assuming that the average cost of preparing and starting a train-load of 200 tons of 35 trucks coal is 2s. 5d. per ton, as is sworn to on the part of the Company and not controverted on the part of the Complainants, the latter have failed to make out that the cost, with the mileage (which is admitted to be correctly charged), would make a tonnage rate less than the charges of which they complain. Unless they establish this—and they certainly have not done so—they have no *locus standi*, and consequently they must bear the usual penalty of an unsuccessful experiment by having their rule discharged, with costs."—*Tried in Court of Common Pleas, Easter Term*, 1858.—*From Neville and Macnamara's Reports, vol.* 1, *page* 116.

275. *Ransome* v. *Eastern Counties Railway Company.*—Action in respect of undue preference of coal rates. There were two issues. The first—(1) Plaintiffs complained that the Company had contrived rates designed to give the traders of land-borne coal *via* Peterborough an advantage over sea-borne coal imported into Ipswich and sent to interior stations. The Company divided their line into coal districts, applying certain rates to each district. Plaintiffs carry on their coal business from Ipswich at Needham Market, Stowmarket, Elmswell, Thurston, and Bury St. Edmunds, Mellis, Diss, and Hadleigh. These stations, instead of being classed in one district, were classed in three different districts. The Company gave the Peterborough coal merchants low rates for train-loads of 200 tons, provided the destination stations were within one

district. The Plaintiffs, who had not sufficient stations in any one assigned district to send at one time 200 tons, were thus placed at great disadvantage, and they contended there was undue preference.

The Company contended they had not framed the districts to injure sea-borne coal, but to accommodate the requirements of the districts; that by this arrangement they were enabled to get traders to send full train-loads, which could reasonably be carried at less cost. Justice Williams, in giving Judgment, said—"On the whole, we think the ground of complaint has not been sustained. We think the Company have failed to show the district is not disadvantageous to Plaintiffs; yet we cannot find sufficient to justify us in coming to the conclusion that Plaintiffs are unduly subjected to this disadvantage, or that it is caused by any undue preference or partiality, as suggested. It is their misfortune, which we cannot remedy, if the state of their trade is such that it happens not to accommodate itself to a scale and system of rates which does not appear to be disadvantageous to the public at large or objectionable in other respects."

(2) That the rates for *train-loads* from Peterborough are out of all proportion greater than the rates from Ipswich for *train-loads*, as follows:—

From Ipswich.					From Peterborough.				
Miles.	To	s.	d.		Miles.	To	s.	d.	
27	Bury ...	2	5	per Ton.	74	Bury ...	4	3	per Ton.
23	Thurston...	2	2	„	78	Thurston...	4	4	„
18	Elmswell...	1	10	„	83	Elmswell...	4	5	„
27	Diss... ...	2	5	„	98	Diss... ...	4	6	„
23	Mellis ...	2	2	„	95	Mellis ...	4	6	„

The Company contended there were circumstances that justified the difference, because the cost of carrying coal for long distances is proportionately less than the cost of carrying it short distances, also that the profit was greater to the Company for carrying the long distance than the shorter one; that the scale of rates and adjustment of districts extended to the ports of Wisbeach, Lynn, Yarmouth, Lowestoft, Harwich, and Colchester.

Justice Williams said—"There is a portion of the scale of rates as to which we think no satisfactory explanation has been

given by the Company. The scale of train-loads of coal in owners' waggons is as follows :—

INCREASE OF SCALE OF RATES.

MILES.				
14 to 20	1d. per Ton per mile.			
20 to 60	1d.	„	for each 2 miles.	
60 to 75	1d.	„	„ 3	„
	1d.	„	„ 4	„
75 to 81	1d.	„	„ 6	„
81 to 93	1d.	„	„ 12	„
93 to 100	1d.	„	„ 6	„
100 to 137	1d.	„	„ 2	„

"Thus, in effect, the distance from Peterborough as regards carriage is abridged in the instances of the 76 to 81 miles, the 82 to 93 miles, and the 95 to 100 miles to the extent of 5, 11, and 5 miles respectively, and the Peterborough dealers are only charged 2d. per ton for the journey of 24 miles between 76 and 100 miles from Peterborough. It will be found between these points lie all the places in dispute (except Bury and Hadleigh) where Plaintiffs deal, and where the land-borne coal is alleged to be brought into competition with the sea-borne. Thus, also, Stowmarket and Needham Market, 88 and 92 miles from Peterborough, are charged as if 82 miles, and other stations likewise. But as soon as the distance reaches 100 miles, where the competitive stations are passed, the scale resumes the decreasing ratio of 1d. for every two miles. This anomalous feature pervades all the districts from the other ports. If it had been confined to Peterborough and Ipswich, the pressure on the Company would have been so transparent that it would have been a palpable evasion of the injunction already obtained in this Court—*Ransome* v. *Eastern Counties Railway Company* (26 Law Journal Reports, 91 C.P.). It is a question whether the rate thus guarded is not in reality a disguised infringement of the principles on which the previous Judgment of this Court was founded. The effect of the scale of rates is to diminish the natural geographical advantages of the Ipswich dealers to the towns in question, and annihilate in point of expense a portion of the distance from Peterborough to the same towns. We are therefore of opinion that a writ must be issued enjoining the Company to desist from giving

undue preference, the Company to pay the costs."—*Tried at the Court of Common Pleas, February* 25, 1858.—*From Law Journal Reports, vol.* 27, *page* 167, *C.P.*

276. *Harris* v. *Cockermouth and Workington Railway Company.*—Action in respect of undue preference in the matter of coal rates. The Railway Company was threatened by the owner of extensive collieries (Lord Lonsdale), which he had at considerable expense connected with the Company's line, that unless coals were carried to Workington, the terminus of the line, at a certain rate, he would construct a tramway for his collieries to Workington, and so divert his coal traffic from their line. The Company entered into an agreement to carry the coals at less than the rate charged to other collieries in the district. Held—That this was an undue preference within the 17 & 18 Vic., cap. 31, sec. 2. Verdict against Company.—*Tried in Court of Common Pleas, January* 15, 1858.—*From Law Journal Reports, vol.* 27, *page* 62.

277. *Nicholson (and others)* v. *Great Western Railway Company.*—Action arising from undue preference in rates given to Ruabon Coal Company on carriage of coal. On 31st January, 1856, the Great Western Company entered into an agreement with the Coal Company by which numerous advantages—all reducible to a money value—were secured to the coal traffic of this Coal Company, to the prejudice of the coal owners of the Forest of Dean. The agreement was for ten years, the coal to be carried beyond the distance of 100 miles, and such a quantity carried as would produce to the Railway Company £40,000 per annum in fully-loaded coal trains. The Great Western Company denied any secrecy in making agreement, and alleged that a similar offer was made to all the senders of coal on Great Western line. The Railway Company proposed to all traders a graduated scale, in respect of quantities and distance, for full loads, while some traders insisted upon a scale graduated by distance only, without contract for quantity. Plaintiff claimed to have the same rate as the Ruabon Company for same distance, irrespective of quantity. Railway Company pleaded that a large traffic guaranteed admits of being worked with greater economy by a special organisation of trains and times. Plaintiff pleaded

that he and others concerned sent their coal to places under 100 miles distant, and that on that account the Railway Company fixed upon 100 miles to favour Ruabon Coal Company, who sent their coal to London; also that two or three persons intimately connected with the Railway Company held the principal number of shares of the Coal Company. A verdict was given for Railway Company, the Court saying—"We think it sufficiently appears that the Great Western Railway, on entering into such agreement, had only the interests of the proprietors in view, and the legitimate increase of the profits of the railway. In the case of Ransome (1 *Common Bench Reports, New Series*, 452) the Court said that in considering the question of undue preference the fair interests of the railway ought to be taken into account. The decision in that case was against the Railway Company, because it appeared the manifest object of the Railway Company in charging different rates was to enable one set of coal owners to compete with another. If the Court could see that a scale of rates had been framed to favour Ruabon Coal Company, and so prejudice the Forest of Dean coal traffic, we should hold that to be undue preference within the Act. But there is not sufficient evidence to lead to this conclusion; and although Plaintiff and others may suffer by this scale of rates in consequence of their local position, that is a matter which the Railway Company cannot interpose to remedy. The Court's construction of the 17 & 18 Vic., cap. 31, is not contravened by the Company carrying at a different rate in consideration of a guarantee of a large quantity of full train-loads at regular periods, provided the real object of the Railway Company be to obtain a greater remunerative profit by a diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee."—*Decision given in Court of Common Pleas, November* 9, 1858.—*From English Clearing House Reports.—Reported in Law Journal Reports, vol.* 28, *page* 89, *C.P.* Plaintiff appealed against this decision to the *Court of Common Bench, January* 13 *and February* 25, 1860, when the majority of the Court confirmed the previous Judgment.—*Law Times, vol.* 2, *page* 234.

278.—*Ransome* v. *Eastern Counties Railway Company.*—On May 29, 1860, Plaintiffs again brought the Company into the Court of Common Bench. The issue was that the Company did not carry from Peterborough to No. 8 District full trains of 200 tons in 35 waggons, but that at Cambridge, the gradients being heavy, the train-load was reduced from 35 to 25 trucks, and the 10 trucks left off were carried forward by ordinary goods trains. Thus the saving in transit of a full train-load was not borne out, and undue preference arose.

Chief Justice Erle held that "the consignees in every case have sent the full quantity of 200 tons. The Court has sanctioned the tariff, and this being so, it is desirable the Court should sustain it where possible, because, upon the faith of its being upheld, large interests have been called into existence and are now reposed. The senders, having consigned to the Company 200 tons coal at Peterborough, had a right to demand of the Company that they would carry the coals at the low rate; and the Company, by carrying in the manner they have adopted, have not given any undue preference to senders. As to the question of competition, it is not the duty of the Court to interfere. It is nothing more than a fair arrangement that dealers sending large quantities of coal a long distance should have them carried at a lower rate than if they sent small quantities, the cost of locomotion being less to the Company." Justices Williams and Byles concurred. Judgment for Company.—*Tried in Court of Common Bench, May* 29, 1860.—*Law Times Reports, vol.* 2, *page* 376.

279. *Oxlade* v. *North Eastern Railway Company.*—Action for undue preference. The Company declined to carry coal for individuals, and confined the carriage of coal to colliery owners, at which the Plaintiff took exception.

It was held by the Court—That there is no obligation on a railway company, whether at common law or under the Railway and Canal Traffic Act, 1854, to carry goods otherwise than according to their profession.

Therefore, it is competent to them to restrict their coal traffic to the carriage of coals for colliery owners from the pit's mouth to stations where such colliery owners have cells or

depôts appropriated to them for the reception and sale of their coals, and to decline to carry coals from station to station, or for coal merchants, such an arrangement being essential to the regulations of the large traffic in that article, and the Company not being common carriers of coal.

Chief Justice Erle said—"I think the Company have a perfect right to say that they will carry coals only for colliery owners. For the reasons alleged by them in their affidavits, it is evident that they could not have the same control over the traffic if they carried coals for the general public. Plaintiff says to the Company, 'Make an exception in my favour because you have hitherto carried my coals for the owners of the Cox Hoe Colliery, and I will abide by all your regulations.' The answer to that is that if the Company do this for Mr. Oxlade they would be bound to do it for all the Queen's subjects, and so would deprive themselves of the benefit of the complicated arrangements which they have found it necessary to adopt in order to insure the safe and convenient use of their railways." Judgment for Company.—*Tried in Court of Common Pleas, June* 14, 1864.—*From Neville and Macnamara's Reports, vol.* 1, *page* 162.

280. *West* v. *London and North Western Railway Company.*—Action for undue preference, by renting to one trader ground at Lubenham Station for storing and selling coal, and refusing it to another. Two coal dealers, West (Plaintiff) and Perkins, were in the habit of sending coal by the Rugby and Stamford Railway to Lubenham Station. The Company allowed Perkins to hold, subject to a month's notice, as a coal wharf, the whole of the land adjoining the station which they considered they could appropriate to such a purpose. Perkins had, in fact, only used part of it, and used it for the purpose of stacking his coal till sold. West found that, unless put on the same footing as Perkins, he could not carry on a coal trade at Lubenham, and he, therefore, applied to the Court to compel the Company either to take away Perkins' privilege or put him in a similar position. Held by Chief Justice Bovill and Justice Keating—That the wharf was part of the railway, and an ordinary and necessary accommodation; and that, as there was a

direct advantage to Perkins and prejudice to West, without sufficient reason, the case was within the Railway and Canal Traffic Act, and the application should be granted. Justice Montague Smith and Justice Brett held that the application was not in respect of the conveyance of coal, but for a store for its deposit for sale, and that the statute did not apply. The Judges being divided, the rule dropped.—*Tried in Court of Common Pleas, June* 16 *and July* 11, 1870.—*From Law Journal Reports, vol.* 39, *page* 282.

281. *Nittshill and Lesmahagow Coal Company* v. *Caledonian Railway Company.*—Action in respect to undue preference in the rate of coal traffic. The Caledonian Company carried coal to Granton for shipment from collieries situated on different branches of their line. On one branch the Company charged different rates per ton per mile for the carriage of different descriptions of coal, viz., a "gas coal" rate and a "common coal" rate. No such classification was made on the other branches.

Cannel coal (the only coal raised by the Complainants) was the only coal charged at the gas coal rate, splint coal being classed as common coal. The gas produced from splint coal is inferior in quantity and quality from that produced from an equal amount of cannel coal, but both are used in different proportions for mixing with common coal in the production of gas, for the purpose of increasing its illuminating power. Found, as a matter of fact—That splint coal and cannel coal had enough in common of gas-producing quality to be competitive, and to make them commercially and substantially of the same description for the purpose for which they were used, and that the cost of conveyance to the Railway Company of splint and cannel coal was the same.

Held—That the carriage of cannel coal and splint coal by the Railway Company at unequal rates per ton per mile was an undue prejudice to the Complainants.

Held also—That if, by reason of the gradients or otherwise, the cost of conveyance of the coal to the Railway Company on the one branch was different from the cost on the other, a proportionate difference might be made by the Railway Company

in the mileage rate. Judgment against the Company.—*Tried in the Court of Railway Commissioners, October* 6, 7, *and* 13, 1874.—*From Neville and Macnamara's Reports, volume* 2, *page* 39.

282. *The Diphwys Casson Slate Company* v. *Festiniog Railway Company.*—Action in respect to undue preference. The Plaintiffs, the Diphwys Casson Slate Company, complained that the Defendants, the Festiniog Railway, granted lower rates to a Mr. Greaves for the carriage of slates over their line to Portmadoc, Mr. Greaves being charged 2s. 6d. per ton, while they were required to pay 3s. 3d. per ton, the service being the same. It appeared Mr. Greaves bound himself, by agreements for fourteen years, to send all the produce of his slate quarry by the Festiniog Railway only. It appeared there was no other railway, but the Company alleged their object was not to encourage the construction of a competing line. They were willing to grant the same rates to the Slate Company on the same terms.

Sir Frederick Peel, the Chief Commissioner, said—"From the Complainants' quarry slate is not more expensive for the Railway Company to carry than slate from other quarries. The difference of charge complained of depends upon its justification upon the promise to use the railway to the exclusion of any other railway, and the question for us is whether a company can grant lower charges in return for such a consideration without creating inequalities which travene the provisions of the Traffic Act. It should be mentioned that as yet there is no other railway by which slate can be sent from the quarries, and therefore no existing competition to be met, and that the object of the Company has been to discourage the construction of a competing line. Equal treatment does not consist in all being offered a similar agreement; for if the agreement is not for the public interests, or goes beyond the fair regard which a company may pay to its own interests, it leaves untouched the right of all under the Traffic Act to be put upon equal terms. The Railway Company cannot compel the public to purchase equality of treatment by imposing conditions of that character or of a character of those contained

in the special agreements of the Festiniog Company. The same offer may be made to all, but circumstances are so unlike that every kind of partiality would ensue if the offer must be accepted or parties submit to higher charges." Judgment against the Railway Company for undue preference.—*Tried in the Court of Railway Commission, December*, 1874, *and January*, 1875.—*From Law Times Reports, vol.* 32, *page* 271.

283. *Lees* v. *Lancashire and Yorkshire Railway Company.*—Action in respect to undue preference. The Plaintiffs (Lees) were colliery proprietors and coal merchants, bringing their coal to the Railway Company's Oldham Road Station, and thence by a short siding into their own coal wharf. In 1872 the Railway Company found their Oldham Road Station so crowded with all kinds of traffic that they were compelled to transfer their coal and mineral traffic to "Miles Platting" Station, and notice was given to the coal merchants accordingly. "Miles Platting" Station was situated a mile from Oldham Road Station, both being in Manchester. The Corporation of Manchester had gas works 50 yards from the Oldham Road Station, with a siding connecting therewith, and the Company continued to carry coal for the gas works, though refusing to carry coal for Lees. This constituted the alleged undue preference.

The Court of Railway Commissioners found, as facts, that "it was a matter of public benefit and convenience that the Corporation should be supplied with coal at the Oldham Road Station, and that the nature and magnitude of their supplies enabled the Railway Company to make such special arrangements for passing them through and out of Oldham Road Station with less inconvenience to the general and ordinary business thereof than would be caused by carrying for the applicants, and therefore held that the preference to the Corporation was neither undue nor unreasonable; there was no competition of interest to make it so. The Corporation did not sell coal. Had it been otherwise—had Messrs. Lees and the Corporation been in the position of trading companies competing with one another—each would have been entitled to be treated as the other, and it would have been for the public benefit that

no difference should be made between them, and that the Railway Company should not be allowed to carry for one while carrying for the other. And we do not think that in carrying coal for the Corporation to a station to which they will not carry coal for other persons the Company are, under the circumstances, abusing their powers as carriers on the line; nor do we think that the one point which distinguishes Messrs. Lees from the other coal dealers, and which assimilates their position to that of the Corporation—the possession, namely, of a piece of ground in direct communication by a siding with the Company's ground—so far removes their case from that of the other coal dealers, or puts them in such like circumstances with the Corporation, to become an undue and unreasonable preference as against the Complainants (the Messrs. Lees), when we cannot hold it to be such as against the public at large." Judgment for the Company. —*Tried in Court of Railway Commission, June*, 1874.—*From Neville and Macnamara's Reports, vol.* 1, *page* 352.

284. *Foreman* v. *Great Eastern Railway Company.*—Action for undue preference in the arrangement of rates for coal. Plaintiffs import sea-borne coal into Great Yarmouth, and send it inland to different stations. The Company carry inland coal from Peterborough to same stations. The short distance rates were high, while the long distance rates were low, thereby prejudicing the Plaintiffs' coal, which was sent only short distances inland from Great Yarmouth. The Court held that if the principle on which the scale was graduated was a fair consideration of the cost to the Company of carrying coals for the different distances, or was justified by sea competition, it was not a valid objection to the scale; that it was better adapted to the business of some merchants than of others; and that its low rates for long distances were useless to those who dealt in the sea-borne coal. The Railway and Canal Traffic Act does not prevent a railway company from having special rates of charge to a terminus to which traffic can be carried by other modes of carriage with which theirs is in competition. The Company had also prevented the Plaintiffs from loading coal directly from the ships into the trucks at the quay side. This the Company were also required to do. Judgment against the

Company.—*Tried in Court of Railway Commission, June* 22, 23, *and July* 5, 1875.—*From Neville and Macnamara's Reports, vol* 2, *page* 202.

285. *Bellsdyke Coal Company* v. *North British Railway Company.*—Action for undue preference in the carriage of coal from the Monkland district of the Defendants' railway. The complaint was that lower rates were granted to Baird & Co. for their coal than was charged to other colliery owners.

The Plaintiffs' collieries were situated in a district which is connected with shipping ports and markets by the lines of the North British Company, which Company charge all the complainants at equal rates. The same Company, however, charge Messrs Baird & Co. a lower rate, and justified the difference on the ground of diminished cost of carriage, the natural position of Baird & Co.'s pit being better, and of the influence of competition.

It is not of valid consideration for a reduced rate on coal, nor a circumstance that can substantially affect the rate at which it can profitably be carried, that the party favoured is the customer of the same railway company in goods of quite a different kind.

Held—That the Railway Company pays no more than a due regard to its own interests if it charges for its services in proportion to their necessary cost, and has only such variety in its rates as there is in the circumstances of its customers; but that under the circumstances of the present case the principle had not been properly applied. Judgment against the Company for undue preference.—*Tried in the Court of Railway Commissioners, February* 18, 19, *and* 20, 1875.—*From Law Times Reports, vol.* 33, *page* 29.

286. *Holland* v. *Festiniog Railway Company.*—Action in respect to undue preference. A railway company agreed with certain quarry owners, for a term of fourteen years, to carry slates for them over the railway at rates varying from 3s. 3d. to 2s. 6d. per ton, according to the total quantity of slates carried by the railway company in each year. The quarry owners, on their part, agreed to send their slates by no other mode of transit during that term. Subsequently a fresh agree-

ment was entered into with one of the quarry owners for a term of thirty years, reducing the rate to 2s. 1½d. Held—That there was nothing in the circumstance as to the exclusive use of the railway being in the one case for thirty years and in the other for fourteen years which would justify the difference between 2s. 6d. and 2s. 1½d. as charges for railway transit, and that such difference was an undue preference and prejudice within the meaning of the Railway and Canal Act, 1854.

The railway company alleged that the applicants, being obliged to use smaller waggons for their slates than those used by the favoured quarry owners, and sending slates of a lighter description, occasioned the railway company greater cost for carriage. Held—That 1d. per ton would be a reasonable allowance for such increased cost.—*Tried in the Court of Railway Commission, January* 24 *and February* 17, 1876.—*From Neville and Macnamara's Reports, vol.* 2, *page* 278.

287.—*The Victoria Coal and Iron Company* v. *The Neath and Brecon and the Midland Railway Companies.*—Action in respect of undue preference. The obligation imposed upon every railway company to afford all due and reasonable facilities for receiving and forwarding by its railway traffic coming by another which forms with it a continuous line of communication, is not limited to the cases in which a railway company has accommodation to take over such traffic at the point of junction.

Upon complaint by the lessees of a Colliery situated on the Neath and Brecon Railway to Swansea, that they were prevented sending the traffic of their colliery to Swansea by the railways of the two Companies (Defendants), which formed a direct route, and in consequence had to send it by a circuitous route, it was proved that the two railways formed a continuous line of communication, and that physically there was no difficulty in the traffic of the colliery being carried to Swansea by the direct route.

Held—That the Applicants were entitled, under section 2 of the Railway and Canal Traffic Act, 1854, to have their traffic conveyed by any route they pleased, and to use the two railways as if they were one continuous line. Judgment

against the Companies.—*Tried in Court of Railway Commission, April* 10 *and May* 17, 1877.—*From Solicitors' Journal, vol.* 21, *page* 822.

288. *Lock* v. *North Eastern Railway Company.*—Action in respect to undue preference in allowing to some coal merchants cells or depôts, and not to other merchants. The North Eastern Railway Company carried coal to stations for colliery owners only, and at each station there were cells or depôts which were let on rental to colliery owners for their separate use, in which their coal was allowed to be stored and sold by retail. Colliery owners were allowed to send coal to a station although they had no depôt at it, and the Railway Company kept one or more depôts at each station unappropriated, through which coal so sent was delivered. Senders of coal who had not depôts could send for delivery only, and had to arrange for their coal being carted away within a short time of its arrival. The sidings being reserved for goods traffic, such coal had to be unloaded into an unallotted depôt, and for that there was an extra charge of 3d. per ton. Such coal was also charged with a higher rate for carriage, an allowance of $2\frac{1}{2}$ per cent. being made in favour of coal sold through allotted depôts. The Railway Company attempted to justify the difference in the rates of carriage on the ground that $\frac{1}{2}$ cwt. of coal was the loss to the coal owner in the retailing of a ton of coal, and said that the extra charge of 3d. per ton was the equivalent of the rent paid for an allotted depôt. Held—That neither the higher rate for carriage could be justified, because the loss to the coal owner in the retailing of a ton of coal was the same whether the coal was sold on or off the Railway Company's premises, nor the extra charge of 3d. per ton for unallotted, because the service covered by the rent and the tonnage rate were not the same; and that for the Railway Company, who carried alike for those who had depôts and those who had not, to charge more in the one case than in the other, either for transport or for unloading, was an infringement of section 2 of the Railway and Canal Traffic Act, 1854.

Semble—That the Railway Company cannot make any terminal charge for merely unloading coal into a depôt where

they have no sidings for delivery.—*Tried in the Court of Railway Commission, May* 5, 1877.—*From the Solicitors' Journal and Reporter, vol.* 21, *page* 835.

289. *Lloyd* v. *Northampton and Banbury Railway Company.*—Action in respect to undue preference in through rates and terminal charges. The traffic was ironstone, at Easton Neston, Northamptonshire, where Plaintiff had one and a half miles of siding connected with the Company's line, Blisworth to Green's Norton Junction. Plaintiff's siding was three and a half miles from Blisworth. Distant two and a half miles from Plaintiff's siding was another ironstone mine with sidings, and it was from this other siding the alleged undue preference took its rise. It seemed these two sidings were grouped together at equal rates; Plaintiff's position being a few miles nearer to the point the ironstone travelled (South Wales), he claimed a lower rate.

Upon complaint by a trader that he was subjected to an undue preference within the meaning of section 2 of the Railway and Canal Act, 1854, because he was charged the same through rates for traffic from his siding as was charged for traffic from a siding which was situated at a further distance of two or three miles, it was proved that both sidings were situated in the same district, and had been grouped together by the Railway Company for through rate purposes.

Held—That no undue prejudice was caused by the same rate being made applicable to both places; that, as a through rate was a gross sum of small amount for conveyance over a long route, it was impossible to make its amount vary with slight differences of distance; that it was enough if places that were practically in the same district had the same rate, but as a district must have an area of some extent, there would necessarily be some points in it that were nearer than others to the common destination.

Upon proof that a railway had charged more than they were entitled to take under the maximum clause of their special Act, the Railway Commissioners made an order under section 2 of the Railway and Canal Act, 1854, enjoining the railway company to desist in future from exceeding the limit

prescribed by their special Act. Judgment for Company.—*Tried before the Railway Commission, July* 22, 1878.—*From Solicitors' Journal, vol.* 23, *page* 624.

UNDUE PREFERENCE IN RESPECT TO RATES FOR CARRIAGE OF GOODS.

	Case No.		Case No.
Oxlade v. *North Eastern* (1857)	272	*Southsea Co.* v. *L. & S. W.* (1876)	292
Baxendale v. *G. W* (1858) ...	301	*Greenop* v. *South Eastern* (1876)	293
Garton v. *B. & E.* (1859)	303	*Budd* v. *L. & N. W.* (1877)	294
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DIGEST.

In *Oxlade* v. *North Eastern* (1857) Justice Cresswell said —"A railway is justified in carrying goods for one person at a less rate than that at which they carry the same description of goods for another. if there be circumstances which render the cost to the Company of carrying for the former less than the cost of carrying for the latter."

In *Baxendale* v. *Great Western* (1858, Bristol case) the Company's rate for paper was 35s. per ton, Bristol to London. On sender (Somerville) undertaking to give the Company all his traffic to other towns, they gave him a rate of 23s. 4d. per ton, and at first without restriction, but subsequently restricted it as at owner's risk. Thus Plaintiffs lost Somerville's traffic, out of which they had received cartage from the Company out of the carted rate of 1s. 6d. in Bristol and 3s. 4d. in London. The contention was the granting of the lower rate was undue preference, and Justice Willes held that it was undue preference within the Act.

In *Garton* v. *Bristol and Exeter* (1859) it was proved the Company carried groceries and ironmongery from Bristol to Bridgewater for certain traders at 6s. per ton, in opposition to a steamer, but the Company would not carry them for Plaintiff at the same rate. The Court held this to be undue preference.

In *Garton* v. *B. & E.* (1861), owing to water competition, Bristol to Bridgewater, the Company made an arrangement with certain Bridgewater traders to carry certain goods at 6s. per ton if they gave up entirely the water carriage. During this time Plaintiff was charged the ordinary class rates. Held—Plaintiff was not entitled, in an action for money had and received, to recover from the Company the excess of the sums paid by him above those paid by other persons. In the previous trial, June 13, 1859, Chief Justice Cockburn had held this was undue preference.

In *Garton* v. *B. & E.* (1861), Manchester packs, Bristol to Exeter, the Company were enabled to deliver in Exeter at 21s. 8d. per ton, while their charge to Plaintiff, a carrier, was 22s. 6d. This arose owing to the Company getting a cartage allowance from the Midland Company, who brought these packs from Manchester and did not perform cartage in Bristol from one station to the other. Held—Plaintiff was not entitled, in an action for money had and received, to recover from the Company the excess of the sums paid by him above those paid by other persons.

In *Woodger* v. *G. E.* (1875) the Company made package rates for baskets of fish, Yarmouth to London—18 lbs., 3d.; 28 lbs., 4d. Plaintiffs' baskets weighed 20 lbs., and consequently were charged 4d. under the 28 lbs. scale. The Railway Commissioners gave Judgment against the Company, and required them to carry the 20 lbs. baskets at 3d. (It requires one skilled in microscopy to discover the undue preference; the only parallel is the Act 3 William and Mary, cap. 12, sec. . *See Riley* v. *Horne.*)

In *The Southsea and Isle of Wight Steam Ferry Company* v. *London and South Western* (1876) the Plaintiff Company ran vessels from Southsea to Ryde, and the Railway Company booked passengers through from London to Ryde, which passengers were carried from Southsea to Ryde by a rival steamship company. The Plaintiffs complained of undue preference in respect to

fares, comparing the added locals with the through rate. The Court gave Judgment for the Railway Company.

In *Greenop* v. *South Eastern* (1876) the Company agreed with Flageollet Frères to give them a rebate of 15 per cent. off the station to station rate, and 4d. per package landing charge at Folkestone, if 850 tons of traffic were sent each calendar month from Boulogne Quay to London. Plaintiff contended this was undue preference. The Railway Commissioners held, owing to the circumstances as described in the case, it was not an inequality within the Act.

In *Budd* v. *London and North Western* (1877) within a radius of six miles of Swansea the rate for tin plates to Liverpool was 11s. 4d. per ton. Plaintiffs' works were twelve miles from Swansea, and they were charged 12s. 6d. per ton. Chief Baron Kelly held that this was undue preference within the Act.

In *Richardson* v. *Midland* (1881) the brewers at Newark complained that the rates for ale from Newark to various stations was out of proportion and unfair when contrasted with rates from Burton to places the same distance, and that this was undue preference. The Railway Commissioners held that the rates from Burton were justifiable.

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290. *Baxendale (Pickford & Co.)* v. *Great Western Railway Company.*—Action arising from undue preference in the rates for biscuits, Reading to London. The rate had been 8s. 4d. per ton, collected and delivered, the cartage allowance being 1s. 6d. in Reading and 3s. 4d. in London. On the 19th April, 1858, the Company gave Plaintiffs (Pickford & Co.) notice that they would make no cartage allowance on small consignments under 500 lbs. Thus the Company charged Plaintiffs on such consignments 8s. 4d. per ton, station to station, while the Company, for the same charge, collected and delivered to other persons such small consignments. This was the alleged undue preference. The Company contended, by 7 Vic., cap. 3, they were empowered, when acting as carriers, to

make such charges (not exceeding sums limited by their former Acts) as they should think expedient; and by section 51 they are empowered to make arrangements for the assortment and delivery of goods and parcels. By the 10 & 11 Vic., cap. 226, sec. 54, it is enacted that—

"For the carriage of small parcels (that is to say, parcels not exceeding 500 lbs. each) the Company may demand any sum which they think fit, provided always that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages."

Chief Justice Cockburn said—"These provisions of the Act apply only to carriage on the railway. Here the Company profess to charge 8s. 4d. per ton in respect of the carriage from station to station, whereas in fact the charge comprehends something which is done beyond the railway. It might, perhaps, be a legitimate proceeding to alter the rate if the object of the Company was merely to bring increased traffic on the line. But here the object manifestly is to make a profit of the collection and delivery. The charge of 8s. 4d. is ostensibly for carriage on the railway, but in reality it is to cover the collection and delivery likewise. *Parker* v. *Great Western Railway Company* is precisely in point. The real question here is whether the Company are, under colour of a charge for carriage upon the railway, making the Complainants pay for a service which they do not require at their hands. What right have the Company to compel all the world to employ them to collect and deliver? In reality the charge is made by the Company in a character and interest independent of the railway, viz., as carriers to and from the termini of the railway; and, secondly, that the Company can convert that which is in reality a charge for collecting and delivering, as well as for carrying, into one for carrying only, by affixing to it the latter denomination in their table of rates. It is true the Company's Acts give them power to impose their own rates of charge for the carriage of this description of traffic, but these Acts give them no power to impose tolls or charges for collecting and delivering; and it is palpably an abuse of their powers if, under the name of a charge for carrying, they impose, otherwise than with

the assent of the parties concerned, a charge for a totally different thing. And although the Legislature has conferred the power of imposing rates of charge, it has annexed to this power the obligation of imposing such rates equally, and the Company cannot be permitted to evade this obligation by colourably pretending that that which is in fact a charge for other things as well as for carriage is a charge for carriage only." Verdict against Company, with costs.—*Tried in the Court of Common Pleas, November* 15, 1858.—*From Neville and Macnamara's Reports, vol.* 1, *page* 202.

291. *Woodger* v. *Great Eastern Railway Company.*—Action in respect to undue preference. The Great Eastern Railway Company fixed certain package rates for the conveyance of fish from Yarmouth to London, as follows:—

Under	and	not	exceeding	18 lbs.	...	...	3d. per package.
„	„	28	„	...	.	4d.	„
„	„	42	„	...	...	6d.	„
„	„	56	„	...	...	8d.	„

Messrs. Woodger and Son, trading at Yarmouth, sent packages of fish in baskets of 20 lbs. weight, for which they were charged under the above scale at the rate of 4d. as for 28 lbs. It was proved that they could not alter the size of their baskets without injury to their business, and that baskets 21 lbs. in weight did not cost the Company more expense or labour than baskets of 18 lbs. in weight.

The Court gave Judgment for the Applicants, saying they were entitled to a 3d. rate for packages not exceeding 21 lbs. The only reason the Defendants gave for fixing the minimum rate of 3d. for 18 lbs. was because it was usual to have the minimum charge higher in proportion than the others, and because smaller packages cost greater trouble and expense. They had failed to prove that 21-lb. packages would cost more labour or expense to the Company than packages of 18 lbs. As this was the first case of the kind, there would be no order as to costs.—Judgment against the Company.—*Tried in the Court of Railway Commission, February* 11, 1875.—*From Neville and Macnamara's Reports, vol.* 2, *page* 102.

This is an extraordinary decision, and it is difficult for an ordinary mind to discover wherein the undue preference can be discerned.

292. *The Southsea and Isle of Wight Steam Ferry Company* v. *London and South Western Railway and London Brighton and South Coast Railway.*—Action in respect to inequality in rates. The Southsea and Isle of Wight Steam Ferry Company and the Portsmouth and Ryde Steam Packet Company respectively owned passenger steamboats plying between Southsea and Ryde. The Brighton and South Western Railway Companies carried passengers by their lines to Southsea, and having entered into a traffic arrangement with the Ryde United Steam Packet Company (hereafter called the Packet Company) that their vessels should run between Southsea and Ryde in connection with the lines of the two Railway Companies, issued through tickets to passengers from places on their lines to Ryde, available by the boats of the Packet Company, to the exclusion of the boats of the Southsea Steamboat Company. Held—That under the circumstances this arrangement did not amount to an undue preference of the Packet Company. The Southsea Steamboat Company alleged that the fares charged by the Railway Companies in respect of the part of the journey performed on the steamboats of the Packet Company were unreasonably high. Held—That this was a question which could not be raised by the Southsea Steam Ferry Company against the Railway Companies.—*Tried in the Court of Railway Commission, May* 4, 1876.—*From Neville and Macnamara's Reports, vol.* 2, *page* 341.

293. *Greenop* v. *South Eastern Railway Company.*—Action for alleged undue preference in granting a lower rate for a large quantity of goods than charged for small quantities. The South Eastern Railway Company entered into a special agreement with Messrs. Flageolett Frères, by which the latter guaranteed to send between Boulogne Quay and London 850 tons of goods each calendar month. In consideration of that agreement the Company allowed Messrs. F. & Co. a rebate of 15 per cent. off their tariff of station to station rates, and exempted them from a landing charge at Folkestone of 4d. a package, payable to the Railway Company on goods of particular descriptions, and charged them from 6d. to 1s. less than others on parcels exceeding 56 lbs. in weight.

Held—That as there were circumstances which enhanced the value to the Railway Company of the guarantee of quantity, and compelled Messrs. F. & Co. to incur considerable expense and labour to earn the allowance, and as the Railway Company had always been ready to make a proportionate allowance for a similar amount of traffic to anyone giving a guarantee similar (except as to amount), no injunction should be granted.

The South Eastern Company carried goods at agreed through rates between London and Paris, for which the Railway Company undertook, for the fixed amount paid, every kind of service and charge incidental to the transit from point to point. The sum paid included clearing the goods in the Custom House, which was done only by the Railway Company's servants, or, if done by Custom House agents, no rebate was allowed by the Railway Company.

Held—That the plan of delivery of goods between London and Paris at one fixed sum for the entire service, and free of any intermediate charges, was a great convenience to the public, and did not involve any infringement of the Railway and Canal Traffic Act, 1854.

Semble—If a trader is able and engages to supply traffic with regularity, and in certain quantities, for the accommodation of a Railway Company, so that a lower rate in his case is as remunerative to the Railway Company as a higher rate on similar traffic in the case of others, such an arrangement is not an inequality within the Railway and Canal Traffic Act, 1854. Judgment for Company.—*Tried in Court of Railway Commission, April* 19, *May* 12, 1876.—*From Neville and Macnamara's Reports, vol.* 2, page 319.

294. *Budd* v. *London and North Western Railway Company.*—Action for £50 alleged overcharges on carriage of tin plates, Ystalyfera to Liverpool. Ystalyfera is situated twelve miles from Swansea, and the rate charged Plaintiff for tin plates, Ystalyfera to Liverpool, is 12s. 6d. per ton. The rate from Swansea and the tin plate works within a radius of six miles of Swansea is 11s. 4d. per ton, owing to the competition by sea carriage. Plaintiff contends that this is undue preference. Chief Baron Kelly, Baron Cleasby, and Baron

Huddleston held that this case was controlled by the case of *Evershed* v. *London and North Western*, and that it was consequently undue preference, and Judgment was accordingly against the Company.—*Tried in the Court of Exchequer, June* 18, 1877.—*From Law Times Reports, vol.* 36, *page* 802.

295. *Richardson* v. *Midland Railway.*—Action in respect to undue preference. The Midland Railway Company carried beer from Burton at less rates than from Newark, which was forty miles distant from Burton. Upon complaint by brewers at Newark that their traffic was unduly prejudiced by not being carried on as fair terms as from Burton, it appeared that the Railway Company charged all brewers at Burton a uniform rate of 1½d. per ton per mile, station to station, with a minimum of 5s., including loading and unloading, and an abatement off the quoted rates of 9d. per ton for loading or unloading and 4½d. per ton for haulage when the brewers did those services themselves instead of employing the Railway Company to do them, and that the Railway Company's charges for brewers' traffic from Newark exceeded the charges from Burton to the extent of 25 to 30 per cent.

Held—That the lower charges for carrying beer from Burton were justified. Judgment for Company.—*Tried in the Court of Railway Commission, July* 12 *and* 13 *and August* 6, 1881. —*From Solicitors' Journal, vol.* 25, *page* 835.

CARTAGE ALLOWANCES IN RESPECT TO THE COLLECTION AND DELIVERY OF GOODS (SMALL PACKAGES UNDER 500 LBS.) AND PARCELS.

	Case No.		No.
Parker v. *G. W.* (1844)	296	*Garton* v. *B. & E.* (1859)	385
Parker v. *B. & E.* (1851)	297	*Baxendale* v. *G. W.* (1863)... ...	304
Parker v. *G. W.* (1856)	298	*Baxendale* v. *G. W.* (1864)... ...	305
Parker v. *G. W.* (1856)	299	*Baxendale* v. *L. & S. W.* (1866)	306
Baxendale v. *N. D.* (1857)... ...	300	*Goddard* v. *L. & S. W.* (1874) ...	307
Baxendale v. *G. W.* (1858)... ...	301	*Robertson* v. *Mid. G. W.* (1876)...	308

DIGEST.

In *Parker* v. *Great Western* (Feb., 1844), this was a case where the Company refused to allow cartage on

packages under 500 lbs., and which was decided against them.

In *Parker* v. *Bristol and Exeter* (1851) the Company made a cartage allowance of 2s. 6d. in London and 1s. in Taunton, and Plaintiff demanded 5s. in London and 2s. 6d. in the country. It was left to the Jury to decide *in globo* what Plaintiff should get; consequently no principle was established. The Jury gave Plaintiff £9 0s. 4d.

In *Parker* v. *Great Western* (1856), this was a mixed case and various issues, principally as to the charging of parcels under 500 lbs. separately, instead of clubbing them together and charging the tonnage rate. The Company were successful in the main.

In *Parker* v. *Great Western* (1856) the Company made a three years' agreement with four carriers who had city (London) receiving-houses, to allow them 3s. 4d. per ton cartage and 1s. 6d. per ton commission for agency on their giving up acting as carriers to towns on the Company's system. Plaintiff contended the 1s. 6d. came out of the mileage rate, and that, practically, his goods were charged that much more than such goods as the Company's three agents delivered. The Court held that this was not undue preference.

In *Baxendale* v. *North Devon* (1857) packs from Manchester to Barnstaple, when sent through, were charged 50s. If invoiced Manchester to Bristol, the cost was 30s., and from Bristol to Barnstaple 22s. 6d. *delivered.* Plaintiffs' case amounted to a complaint that the Company would not grant them any cartage allowance at Barnstaple, and that there was undue preference. Judgment was given for Plaintiffs.

In *Baxendale* v. *Great Western* (1858, Reading case) the Company gave Plaintiff, notice that out of the rate of 8s. 4d. per ton, Reading to London, for biscuits, they would cease, on a certain date, to make the cartage allowance of 1s. 6d. per ton at Reading and 3s. 4d. per ton in London *on small consignments of* 500 *lbs.*

Such consignments, however, the Company continued to collect and deliver, and they continued to do so at the 8s. 4d. per ton carted rate. Chief Justice Cockburn held that this was undue preference within the Act.

In *Garton* v. *Bristol and Exeter* (1859) Wall, the Company's carting agent, had a receiving-house in Bristol city, and goods delivered there after 5.15 p.m. were carted to the station by Wall, who charged cartage for doing it, and such goods were sent forward by train same night; whereas the Company's station was closed against Plaintiff at 5.15 p.m. Thus Wall got Plaintiff's cartage trade, which was alleged to be undue preference. Chief Justice Cockburn held that it was undue preference within the Act. Judgment for Plaintiff.

In *Garton* v. *Great Western* (1859) it was held to be undue preference towards a carrier not to grant him cartage allowance on packages under 500 lbs. which he had carted, while for same charge such packages are collected and delivered by Company's carts for traders.

In *Baxendale* v. *Great Western* (1863) Plaintiffs claimed £443, cartage allowance of 3s. 4d. per ton in London and 1s. 6d. per ton in country on consignments of goods under 500 lbs. The Company contended by their special Acts they were free to make any reasonable charge they thought fit for such parcels. Plaintiffs contended that the cost to the Company of carting goods to and from the stations as well as carrying them on their line must have exceeded the cost of carrying them on the line only, and that to the extent of this excess their charges must have been excessive and illegal. The Court felt bound by the decisions, *Pickford* v. *Grand Junction* and *Baxendale* v. *Great Western*, and gave Judgment for the Plaintiffs. Chief Justice Erle dissented.

In *Baxendale* v. *Great Western* (1864), this was a case where the Company, being at liberty to charge what they think fit for parcels under 500 lbs., made a charge inclusive of collection and delivery, and when they

did not perform the service refused to make a cartage allowance. The Judgment was against the Company.

In *Baxendale* v. *London and South Western* (1866) the first item was for overcharges from charging small packages under the "smalls" rate, instead of clubbing them together and charging the tonnage rate. Each package was labelled "Pickford, Guildford Station." Judgment for Plaintiffs. Second item—Not allowing Plaintiffs sufficient cartage allowance for collection and delivery and cartage in London and the country. Judgment for Plaintiffs. Third item—The Company carried, London to Newport, Isle of Wight, 20s. per ton. Plaintiffs did likewise, and the Company charged them 11s. 8d., 16s. 3d., and 19s. 7d., according to class. Plaintiffs claimed a rate of 7s., London to Southampton, to be equal with the Company, showing the other services on the goods cost 13s. Judgment on this head for Company.

In *Goddard* v. *London and South Western* (1874) Plaintiff claimed cartage allowance of 1s. 6d. per ton in Salisbury and 3s. 4d. per ton in London, the same as the Company allowed Chaplin & Horne. The difference averaged 8½d. per ton, and the Railway Commissioners accepted the Company's plea that this excess was given to Chaplin & Horne for services of canvassing, receiving-houses, representation, &c.

In *Robertson* v. *Midland Great Western* (1876) the Company had two sets of rates—(1) for parcels under 21 lbs., for which the carriage is paid by affixing a stamp issued by the Company; (2) ordinary rates for parcels over 21 lbs. The Company's carting agent received 1d. per parcel for the ordinary parcels, and in consideration of this allowance carted the stamped parcels free. Plaintiff claimed to be paid 1d. per parcel for cartage on the stamped parcels, which the Company refused. The Railway Commissioners held that here there was no undue preference.

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296. *Parker* v. *Great Western Railway Company.*—Action

for undue preference in respect to charges, allowance, cartage, &c., between Plaintiff, a carrier, and the Company.

1. The Company had from February, 1842, to April, 1843, allowed the carrier 10 per cent. off the regular rates from London on traffic sent from London. The allowance was made for the service for loading and unloading and re-loading, weighing, making out ticking-off notes and carriers' declaration tickets. This the Company had refused to further allow.

2. The Company during the same period had allowed 5d. and 10d. for collection and delivery of small parcels under 1 cwt. and 2 cwt. This was discontinued by the Company, who performed the collection and delivery by their own carting agent.

3. The practice of the Company was, if a number of packages were from one sender to several consignees, the weight was clubbed and charged on the aggregate; also, if a number of persons brought several packages for one consignee, the weight was clubbed and charged on the aggregate. The Company refused to treat Plaintiff in like manner.

Chief Justice Tindal held that the carrier (Plaintiff) could recover on the separate heads for the several sums overcharged as money had and received; that in each case there was undue preference, and the Judgment must be against the Company. He said—"Of the sum constituting this third head of claim, £17 would not have been charged had the carrier disclosed the names of the senders and consignees of the goods; but we find nothing in the statute requiring him to make such disclosure, and the Company had no right to withhold from him, in consequence of his refusal to make it, any allowance to which he would have been otherwise entitled." Judgment against Company.—*Tried in the Court of Common Pleas, February* 12, 1844.—*From Manning and Granger's Reports, vol.* 7, *page* 253.

297. *Parker* v. *Bristol and Exeter Railway Company.*—Action in respect of cartage allowance on traffic sent from Paddington to Taunton. The Company made a cartage allowance of 2s. 6d. in London for collection or delivery, and 1s. per ton in Taunton for collection or delivery. The Plaintiff

demanded 5s. per ton for collection or delivery in London, and 2s. 6d. in Taunton. This action was brought to recover the amount of the alleged overcharges.

On the first trial, Baron Parke held that the Plaintiff was entitled to maintain the action for such amount as the Jury should think that he had overpaid. Verdict for £9 0s. 4d.

On the appeal case Chief Baron Pollock held that the case of *Ashmole* v. *Wainwright* was a decisive authority governing the present case. "I must, however, express the opinion which, if I were in a Court of Error, I should more freely express, that although I now feel bound by the case, I regret the decision, for it seems to me to break in upon a broad, intelligent principle—that the action for money had and received must be brought for a definite, clear, and certain sum, and not for some unknown sum which is to depend upon the verdict of a Jury, who are to decide whether the Defendant has received the money or not." Judgment against the Company.—*Tried in the Court of Exchequer, June* 17, 1851.—*From Oliver, Beavan, and Lefroy's Railway Cases, vol.* 6, *page* 776.

298. *Parker* v. *Great Western Railway Company.*—Action in respect to cartage allowance and charges on small packages under 500 lbs. The Plaintiff sent to a station of the Company, to be carried by the same train, several parcels of goods, each of which weighed less than 500 lbs. Each parcel contained goods of the same class, namely, drugs, drapery, glass, and stationery, and was a separate package. The Company charged for each parcel separately according to the "smalls" rate. The Plaintiff claimed to have the whole treated as one parcel, and charged at the correct tonnage weight. Held—That under 5 & 6 Will. IV., cap. 107, sec. 171, and the 10 & 11 Vic., cap. 226, sec. 53, whether the correct weight of these parcels did or did not exceed 500 lbs., the Company were entitled to charge for each parcel separately.

The Plaintiff sent on the one day three loads of goods to the station. Each load contained a package of coffee, of which he was both sender and consignee, to be forwarded to the same station by the same train, which was accordingly done. Each package weighed less than 500 lbs., but the three together

exceeded that weight. The Plaintiff at each delivery gave in, as required, a "ticking-off" note, in which the weight was entered by him. On the first and second deliveries the weight was entered as "carried forward," but the Company had no other notice that any other goods would be sent before the starting of the train, and placed each load as it arrived on trucks, this being necessary for the due conduct of their business. Held—That under these circumstances the Company were entitled to charge for each load as a separate package.

The Plaintiff on two occasions sent, at the same times respectively, several packages of goods, of which he was both sender and consignee, to be forwarded by the same trains to the same destination. The articles sent were glass, stationery, shoes, drapery, and ironmongery. Where the parcels were less than 500 lbs. the Company charged them as "smalls." Held —That manufactured goods, in the 10 & 11 Vic., cap. 226, sec. 49, must be understood in a popular sense, as meaning not merely goods produced from the raw state by manual skill and labour, but such as are ordinarily produced in manufactories; and that the maximum rate in that section applied only to tonnage rates, and not to cases where the Company were entitled to charge parcel rates.

Held also—That under the same section the Company were entitled to charge beyond the maximum rates a reasonable sum for loading, covering, and unloading, if they rendered these services.

The Company agreed with certain persons called "agents," who were to collect and receive goods for carriage by the Company, and also to deliver them to the consignees, to pay them for these services 3s. 4d. per ton for cartage, 2d. for delivering each lot of parcels under 200 lbs. and for each separate parcel, 1s. 6d. per ton for agency. The first two of these sums were insufficient remuneration for the services performed, the deficiency being made up by the 1s. 6d. per ton. The Plaintiff himself collected, carted, and delivered all goods sent by him for carriage on the railway, and, having paid the charges for carriage under protest, claimed a return of part on the ground that he was charged unequally in comparison with the "agents."

Held—That under the 50th and 51st sections of the 7 Vic.,

cap. 3, the charges for conveyance between the same stations must be equal to all persons; but that the Company had power to make such arrangements as they thought fit with particular persons in regard to the collection and delivery of parcels, subject only to appeal to the Sessions by any person to whom they were unwilling to grant the same facilities.—*Tried in the Court of Queen's Bench, 23rd February*, 1856.—*From Law Journal Reports, vol. 25, page* 209.

299. *Parker* v. *Great Western Railway Company.*—Action, under eight counts, for alleged overcharges in the classification and rating of small packages under 500 lbs. weight—in fact, whether certain small packages should be charged as "smalls" or aggregated and charged at the tonnage rate. The Plaintiff was a carrier, and his object seems to have been to send small packages under 500 lbs. in the aggregate at the tonnage rate, and charge his different customers a higher charge, as for single packages, and thus to obtain the profit on the "smalls" instead of the Railway Company, which is one of the phases of the "packed parcel" system.

First Case.—On Nov. 1, 1852, Plaintiff sent a consignment of packages. Each package was under 500 lbs., and the aggregate of all the packages was also under 500 lbs. Each package contained goods in the fourth class, viz., drugs, drapery, glass, and stationery. Plaintiff claimed to have the weight of the lot clubbed together and charged at the tonnage rate.

Judge Coleridge—"The power of the Company to charge for parcels after Nov. 1, 1852, depended on their Act, 10 & 11 Vic., cap. 226, sec. 53, by which it is enacted—

'The Company, for the carriage of small parcels, that is to say, parcels not exceeding 500 lbs. weight each, may demand any sum which they think fit: provided always that articles sent in large aggregate quantities, although made up of several parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages.'

Each of the packages being a separate package, they cannot constitute *one* small parcel within the Act. When they form each a small individual package, there is nothing in the Act which compels the Company to charge for them as one, although their aggregate weight falls short of 500 lbs.

Plaintiff relies on the words 'articles sent in large aggregate quantities, although made up of several parcels.' The illustration which is added, however, seems to us clearly to show to what these words apply—'such as bags of sugar, coffee, meal, and the like;' and the meaning is obvious. Plaintiff also relies upon the fact that the contents of each package were included in the fourth class. But it is undoubtedly true that the classification table has nothing to do with the question of parcel or no parcel; it is made for a wholly different purpose. We are therefore of opinion the Company were entitled to charge for each parcel separately."

Second Case.—The only difference in this case is that the aggregate of a similar consignment was *over* 500 lbs. Justice Coleridge said—"As we have in the previous case decided that each parcel is the subject of a separate charge, our Judgment in this case is the same as the preceding."

Third and Fourth Cases.—These relate to consignments of like kind, but sent before the operation of the 10 & 11 Vic., and the governing statute was the 171st section of the 5 & 6 Will. IV., cap. 107. Plaintiff relies upon the term "single parcel unconnected with parcels of a like nature." Plaintiff on the same day, within an hour or so, sent three loads of goods to the Paddington Station. The goods in all the loads were consigned from and for him, and a separate note was sent with each. On each load was a bag of coffee. The total weight of the three bags was given on the last and third note, and the first and second bags contained the weight respectively "carried forward." The Company charged each bag as a separate "small." Each bag coffee weighed less than 500 lbs., but the three bags weighed over 500 lbs. Justice Coleridge said—"The Company had no further notice than might be inferred from this memorandum. The Company placed each load of goods as it arrived into trucks ready for the train, and it was found that this was necessary for the due conduct of their business as carriers. The question is, whether the Company were bound to charge for the coffee in the aggregate, or might charge for each package of it as a separate parcel; and after much consideration and doubt, we are of opinion that they were not so bound, but might charge for each package as a separate parcel.

Certainly they would have been so bound if the three packages of coffee had been delivered at the station at the same time. The very circumstance of there being three consignment notes in itself leads to the inference of three separate deliveries on three separate contracts, and this is strengthened by every other fact in the case. We cannot see any evidence of any contract between the parties which comprised the carriage of three parcels as one." Judgment for Company.

Fifth and Sixth Cases.—The consignments were identical in these cases. He relied on the term "manufactured goods"—"For all cotton and other wools, drugs, and manufactured goods conveyed any distance not exceeding 50 miles, the sum of 3d. per ton per mile"—used in the 47th section of the 10 & 11 Vic., cap. 226, and thence, by inference, introduced into the 49th section. "Forming the best judgment which we are able in so doubtful a matter, we think that the term 'manufactured goods' must be understood in a popular sense, and must mean, not merely goods produced from the raw state by manual skill and labour, but such as are ordinarily produced in manufactories; and we should therefore exclude stationery, and include shoes, ironmongery, glass, and drapery. The arbitrator will have to apply this principle to the several articles enumerated according to the evidence adduced before him."

Seventh Case.—Plaintiff contended the Company had no right to charge for the "loading, covering, and unloading" of goods over and above their maximum tolls. The Judge, however, decided that the Company by their Act of 10 & 11 Vic., cap. 226, sec. 49, had a special authority for so doing.

Eighth Case.—Claim of undue preference in cartage allowance at Paddington Station. The Company had made a special agreement with four carriers or carting agents, having city receiving-houses and all carriers' appliances, viz., Henry Harris, John Bloomfield & Sons, W. Wright, and T. Seaward. The scale of allowance to all was similar. The following is from Harris's agreement for agency and cartage:—

3s. 4d. per ton, general charge for all goods and smalls carted.
1s. 6d. per ton, commission for agency.
2d. for smalls under 2 cwt. to one consignee and one delivery.
2d. each for single smalls under 2 cwt. and a single delivery.

2d. booking fee payable by the public on down parcels.
2d. each for pitching flats of butter.
3d. „ „ „ poultry and meat under 4 cwt.
1s. „ „ „ when over 4 cwt.
Empty meat, poultry, and provision packages to be collected and brought to station free.
Up empties to be charged at the usual cartage rate.

The agreements were for three years, and contained the usual safety clauses. Since the agreements the agents have given up their respective trades to and from the places to and from which the Company carry goods, but they have continued their usual trade to other places.

The Judge said—"It is found by the case that the 3s. 4d. per ton and the 2d. are insufficient as a remuneration for the services performed, and that the deficiency is made up by the allowance of 1s. 6d. per ton, and it is guaranteed that the tonnage for the 1s. 6d. agency charge shall annually amount to a certain quantity at the least." The Plaintiff's contention amounted to this, that the Company had to pay these agents 1s. 6d. out of the mileage receipts, and that practically his goods were charged that much more than such goods as the Company's agents delivered; that that, under the Company's Act, 7 Vic., cap. 3, sec. 50, was unequal charging. The Judge, however, held that this section did not apply, saying—"It is to be observed that section 50 only requires equality when the passengers or goods pass over the 'same portion of and over the same distance along the railways.' Nothing prevents the Company from charging A. more for carrying him twenty miles on one part (of the railway) than they charge B. for carrying him the same distance on another part, or even from carrying at a loss on one part of the line, though the difference must be defrayed, as here it is alleged to be (the 1s. 6d. per ton agency), out of the general receipts of the Company. We think, for the reasons given, that in this case the Plaintiff's case fails. Upon the whole case our Judgment, therefore, is for the Company. But the case must go back, if required by either party, to the arbitrator, to apply the principles we have laid down in the 5th case." Verdict for Company.—*Tried in Court of Queen's Bench, February* 23, 1856.—*From Law Journal Reports, vol.* 25, *page* 209.

300. *Baxendale* v. *North Devon Railway Company.*—Action arising from undue preference in rates for "packs," Manchester to Barnstaple. Plaintiffs (Pickford & Co.) obtained from all the Companies concerned, except Defendants, a cartage allowance on the traffic, viz., cartage allowance at Manchester, also at Bristol, for transference from Midland to Bristol and Exeter Goods Station; but the Defendants refused to make any cartage allowance at Barnstaple. If packs were consigned at Manchester through Carver & Co., and thence to Barnstaple by J. C. Wall (Bristol and Exeter Company's and North Devon Company's carting agent), the charge to consignee was 50s. per ton. The rate, Manchester to Bristol, was 30s., and Bristol to Barnstaple, *delivered*, 22s. 6d. per ton. Plaintiffs contended there was undue preference, because the Company charged them 22s. 6d. per ton when they carted the packs at Barnstaple, while some traders could get their packs through at 50s. per ton instead of 52s. 6d. per ton.

Chief Justice Cockburn said—"The practical result of your arrangement is—the goods are carried for 2s. 6d. per ton less if they are sent through Carver & Co. and Wall. What right has the Company to impose such a restriction upon the senders of goods? How can it be for the benefit (counsel alleging same) of the public that they should be compelled to transmit their goods through a given individual? The whole is one charge. The North Devon Railway Company forms an integral part of the whole line. The charge is one entire charge, and unless the whole is justifiable the injunction must go. The rule ought at all events to be limited so as to impose upon the North Devon Railway Company as much only of the burden as properly belongs to their line. The Plaintiffs' purpose will be answered probably by making the rule absolute in the more limited form suggested." Verdict against Company.—*Tried in the Court of Common Pleas, November* 9, 1857.—*From Neville and Macnamara's Cases, vol.* 1, *page* 180.

301. *Baxendale* v. *Great Western Railway Company.*—Action for undue preference in rates, Bristol to London. Prior to August, 1857, Plaintiffs (Pickford & Co.) had the carriage of Mr. Somerville's paper, which was carted by sender from his mill

at Bitton to the Bristol Station, for which he received 1s. 6d. cartage allowance, and carted by Pickford & Co. at Paddington, where they received 3s. 4d. per ton. These allowances were made out of a carted rate of 22s. 1d. per ton, first class rate. In August, 1857, the Company advanced the paper to third class, charging 35s. per ton. Pickford & Co., in like manner, had to advance, at which Mr. Somerville was vexed, and threatened to send his paper by sea. The Company was made aware of this, but declined to reduce. Early in December the Company made a special rate with Mr. Somerville of 23s. 4d. per ton for his paper, they doing the cartage in London, included in this charge. Plaintiffs remonstrated, but without effect. It appeared Mr. Somerville had undertaken to give all his outward and inward traffic to the Company, which before he had sent by other carriers:—

"*Golden Mills, Bitton, Feb.* 19, 1858.

"Dear Sir,—In consequence of your charging me for the conveyance of the paper, at my exclusive risk, from Bristol Station to London, 23s. 4d. per ton, delivered within your usual limit, I agree to send by your line all my goods going to stations and places to which you carry.

"William Somerville.

"*To Mr. Wilkinson, Agent for G. W. Ry., Bristol.*"

This letter, however, was long subsequent to the making of the rate. A previous letter, dated December 9, 1857, upon which the bargain was no doubt made, said nothing about owner's risk:—

"Dear Sir,—I am quite willing to send all my papers by your Company to the various places to which you deliver, on condition that your rates are not higher than other companies'. I shall instruct my people to send all goods by you so long as our arrangement of carrying to London continues.

"William Somerville."

Justice Willes said—"The question is, whether it is legitimate ground for giving a preference to one of the customers of the railway that he engages to employ the Company's other lines (other than from Bristol to London) for traffic distinct from and unconnected with the goods in question or their carriage, and we are of opinion that it is not. The goods are the same in quantity and quality, in the cost of receiving and carriage, and in the profit which is thereby made, whether received from Somerville or from Plaintiffs. It is undue and

unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper or not to bind himself to employ them in totally distinct transactions. This case is different from *Nicholson's*. The difference in the charge there was sustained upon goods from and to the same places between persons who sent large quantities at a time, and stipulated to send given large quantities every year, as against other persons who declined to do so. In fact, the advantages made a difference similar to that between selling at wholesale and at retail, the profit of carrying the goods sent in large quantities at the less rate equalling or exceeding the profit when the coal was sent in smaller quantities at the higher rate." Verdict for Plaintiff.—*Tried in Court of Common Pleas, November* 9, 1858.—*From Law Journal Reports, vol.* 28, *page* 69.

302. *Garton* v. *Great Western Railway Company.*—Action in respect of undue preference in relation to cartage allowance as a terminal charge. Plaintiff, a carrier, contended that, although he performed the service of collection and delivery at Bristol and Paddington, he was charged upon goods under 500 lbs. weight the same as other persons for whom collection and delivery was performed. Previous to April 12, 1858, the Company allowed 3s. 4d. per ton in London and 1s. 6d. per ton in Bristol cartage allowance; but after that date they would make no such allowance, the Company's object being to induce persons to employ the Company to collect and deliver goods, and to exclude carriers from competing with the Company in such business.

The Company contended that they made no profit upon the collection and delivery of small parcels, but that this service is gratuitously performed by them as ancillary to the carriage from station to station.

Chief Justice Cockburn said—"In the case of *Baxendale* v. *Great Western Railway (Reading case)* it was carefully concealed from the Court that the Company make no profit by the collection and delivery. The Attorney-General's argument there was that it was competent to the Company to make profit on or off their line. Independently of the concealment, assuming that the

Company derived no profit from the collection or delivery, still the Complainants incurred a disadvantage or undue preference from being charged the same for the carriage of their goods as if they availed themselves of a service which they did not require at the hands of the Company. The effect is this, that in order to compete with the carrier the Company make a man who has his own waggons and horses—and therefore does not require them to collect and deliver for him—pay more than he ought to pay for the transit on the railway. It is clearly a case of undue prejudice against the persons not wanting the accommodation. If the Company feel aggrieved they must go to the Legislature. I must confess that I have always felt that the packed parcel system operates hardly upon the railway. The Company, however, have no right to make a charge nominally for carriage upon the railway, which is in reality for that and something else, and so impose upon a portion of the public services which they do not desire to avail themselves of. That is not a legitimate mode of getting rid of the contest with carriers." Verdict against Company.—*Tried in the Court of Common Pleas, January* 29, 1859.—*From Neville and Macnamara's Reports, vol.* 1, *page* 214.

303. *Garton* v. *Bristol and Exeter Railway Company.*—Action in respect of undue preference acting against Plaintiff, a carting agent.

(1) That the Company refused to accept goods from Plaintiff at their Bristol Station after 5.15 p.m., that being the closing time, whereas the Company received goods from their own carting agent, Wall, up to 7 p.m. and 8 p.m.

(2) That Plaintiff, by delivering goods at Wall's receiving-houses in the city after 5.15 p.m., could get the goods forwarded by the railway the same night, but that Wall charged cartage from the receiving-house to the station; that Plaintiff's livelihood was the collection and cartage delivery to the station, and that his business was thus unduly prejudiced by Wall getting the trade from him.

(3) That the Company's station to station rates between Bristol and Bridgewater were 6s. 8d., 8s. 4d., 12s. 6d., and 16s. 8d., which were charged to Plaintiff, while at the same

time the Company carried groceries and ironmongery goods for certain traders in Bridgewater at 6s. per ton, whereby Plaintiff was prejudiced.

Chief Justice Cockburn held that in the two first counts there was undue preference in allowing Wall to bring in goods after 5.15 p.m.; that the collection and delivery came within the principle of *Baxendale* v. *Great Western Railway* (*Reading case*), and the Judgment must be for Plaintiff; that in the third count it was suggested that there was certain water carriage which might enter into competition with the railway between Bristol and Bridgewater, but it was not shown that it actually did compete with it. "We are not told what is the rate of charge for such water carriage as compared with the carriage by the railway. A *primâ facie* case is made out on the part of the Plaintiff; it is shown that he has not the same facilities afforded him for the conveyance of his goods as are conceded to certain favoured individuals. That called on the Company for an explanation; none has been given, and in the absence of all explanation as to the grounds of this preference, we cannot come to any other conclusion than that the arrangement is made with a view to induce parties to engage with the Company as carriers directly, to the exclusion of a rival carrier." Justice Williams said—"There is no reason why the Railway Company may not prescribe a certain hour after which they will not receive goods to go by the next train. So also, if they please, they may protract that time somewhat by half an hour or an hour, on condition that those who come after the appointed time and within the protracted time should pay something extra that may be reasonably sufficient to compensate for the extra hands that may be required to conduct the business which has accumulated in consequence of the goods that are brought so late." Justices Willes and Byles concurred. Judgment against Company.—*Tried in Court of Common Pleas, June* 13, 1859.—*From Common Bench Reports, vol.* 6, *page* 639; *Law Journal Reports, vol.* 28, *page* 306.

304. *Baxendale* v. *Great Western Railway Company.*—Action for £443 10s. 2d., cartage allowance of 3s. 4d. per ton in London and 1s. 6d. per ton at country stations upon consign-

ments of goods under 500 lbs. weight. On April 17, 1858, the Company gave Plaintiffs notice that from that date they would not pay cartage allowance upon such consignments. The Company were incorporated by the 5 & 6 Will. IV., cap. 107. Under a similar Act Plaintiffs, in a previous similar case (*Pickford* v. *Grand Junction Railway Company*, 10 M. & W., 399), claimed to have established the law in cases of this nature. The Company's old Act, and several subsequent ones, had been amended by the Acts of 7 & 8 Vic., cap. 3, & 10 and 11 Vic., cap. 226. Under the 51st section of the 7 & 8 Vic., cap. 3, the Company's position of carriers is more distinctly defined; whereas, in the old Acts, railway companies were incorporated rather as road proprietors, the railway to be used by persons with their own engines and carriages, on payment of a mileage toll. The section 51 provides and enacts that—

"In all cases where the Great Western Railway Company are entrusted with the carriage or delivery of any goods, wares, merchandise, or parcels, or other matters or things, it shall be lawful for the said Company to enter into such arrangements as they shall think fit with all or any of the persons to whom such goods, wares, &c., may belong, or by whom the same may be brought or sent for conveyance on the said railway, with reference to the warehousing, assortment, weighing, loading or unloading, risk of stowage, and liability to alleged pilferage or damage, or *with reference to the collection and delivery of such goods;* . . . and it shall be lawful for the said Company to enter into and make such arrangements as they may see fit with any Company or person with regard to the collection or delivery of such goods," &c.

By the 10 & 11 Vic., sec. 53—

"For the carriage of small parcels not exceeding 500 lbs. each the Company may demand any sum which they think fit;" then follows the usual exceptions.

The Company contended (1) that they are entitled to make the charges complained of, the amount charged for conveyance being within the authority given them by their Acts; (2) that the rates complained of were charged to all persons alike, and it was open to the plaintiffs to have availed themselves of collection and delivery by the Company; (3) that no partiality or unfairness, as against the Plaintiffs, existed; (4) that the remedy (if any) is not by action, but by the appeal given by the Company's Act to the Court of Quarter Sessions. Plaintiffs' chief plea was—"That the cost to the Company of carting goods to and from the stations as well as carrying them on their

line must have exceeded the cost of carrying them on the line only, and that to the extent of this excess their charge must have been excessive and illegal."

The majority of the Court (Justices Williams, Byles, and Keating) said they felt bound by the decisions in Court of Exchequer and this Court in *Pickford* v. *Grand Junction* (10 M. & W., 399), *Parker* v. *Great Western* (13 L.J., 105 C.P.), *Baxendale* v. *Great Western* (28 L.J., 81 C.P.), and gave Judgment for Plaintiffs. Chief Justice Erle dissented, and gave a long written Judgment in favour of the Company, of which the following are extracts :—"I think the Company's Act of 10 & 11 Vic., cap. 226, intended to overrule some of the principles supposed to be deduced from *Pickford* v. *Grand Junction*, and to free the Company therefrom. The real interest at stake here, as in a vast extent of other similar litigation, is the interest derived from the interceptor of parcels from consignees, so that the interceptor may reduce many to one by aggregation. In an action an intercepting carrier has no greater right than any other customer, although under the Traffic Act (17 & 18 Vic., cap. 31), if this Court thinks that the process of interception ought to be supported, anything that hinders interception may be prohibited by injunction as an undue prejudice. If the terms of the Company are not unlawful, if all equally have the accommodation they offer, and all equally are called on to pay the same price for the same accommodation, according to the price for that accommodation as the carriers have chosen to classify it, they have violated no duty. But the law, which requires equal impartiality, makes no reference to the difference in the amount of benefit received from the service, according to the circumstances of each customer. The words of the 53rd section of the statute are—

'For the carriage of parcels under 500 lbs. weight the Company may demand any sum which they think fit.'

These words grant absolute discretion. This is evidence of an intention to give a free discretional power, controlled only by the common law duty to carry for *all* according to the terms they profess. According to Plaintiffs, the supposed right of carriers carrying by railway to intercept the profit on parcels

by the process of packing, and to claim a reduction on account of the carting which they do for themselves, if it ever existed, remained unaffected by the 10 & 11 Vic., cap. 226, sec. 53. According to the Company, the Legislature expressed thereby an intention to release the Company from any liability in respect of such supposed right. The real grievance is the loss of large sums of money which are received for the carriage of parcels, a loss constantly increasing in amount as the process of packing is better understood and the number of intercepting carriers multiplied, and a loss accompanied both with hindrance in the conduct of business and also with much litigation if the Companies make any effort to save a portion of the sums due for the carriage of parcels being intercepted. It has been an undisputed fact that the carriage of parcels under a given weight is the most profitable part of the business of a carrier by rapid conveyance, and was well known to be so before railways existed. Receipts for tonnage rates depend *on the weight* of things classed as tonnage goods. Receipts for parcels depend mainly *on the number* of senders and very slightly on the weight of consignments. The Company receive, London to Reading, for two parcels 7 lbs. each 3s.; if the interceptor packs the two together in one package and consigns it by the Company, he pays 1s. 6d. to the Company and keeps 1s. 6d. for himself. If the parcels are of the same value the interceptors will have added double the weight and the risk and taken away half the pay due to the Company according to the tariff. By skilful aggregation they may increase the weight and the risk to a very great extent and diminish the pay to the Company, and keep for themselves the difference between what the Company so receives and what is due according to the tariff. The senders pay the same sum, whoever may be entitled to keep it; the contest for it is between the Company and the interceptor, and unless the Company have power to check the process of interception it is probable that the interceptor may, by skilful aggregation, bring all consignments into tonnage weights, and undersell the Company on parcel rates and keep all the parcel profit, and leave all the outlay, labour, and risk for the Company. All the work is done by the Company, the same whether they keep all their earnings or not. The quantity of

his business (*i.e.*, the Company's) is no ground for depriving a carrier of the hire he stipulates for, and still less is it a reason for granting it to another. The tonnage and parcel rate have no proportionate relation; one is according to weight and the other according to number. A pound of silver weighs as much as a pound of gold, but the weight is no indication of the relative value of the two pieces of metal, neither is the charge for a given weight of tonnage goods any indication of what ought to be the charge for a given weight of parcel goods. In each case this litigation has been unsuccessful to the Companies on the various grounds of fact on which the Court, performing the functions of a Jury, have given their verdict. But it has been constantly renewed on a principle which probably will ultimately prevail, viz., *that service must be paid for according to contract.* The Company profess to carry upon certain terms; among them is the term that parcels shall be paid for at a higher rate than the same weight of tonnage goods. All who employ them are bound to fulfil all the terms on their part to be fulfilled, and those who prevent the Company from receiving the stipulated price for parcels by interception do not fulfil this term, but the contrary. *Pickford* v. *Grand Junction* has been frequently referred to as if it laid down a general rule either in respect to packed parcels or of deduction for cartage. But it is not so. It is a decision on the facts and statutes there in question, and as there understood by the Court. The earlier decisions in the series of cases which followed *Pickford* v. *Grand Junction* by implication recognise the right of the Companies to prevent interception by other carriers, because they decide that the Companies had in *those cases lost the right only on account of their acquiescing in inclosures of parcels made* by customers not carriers, who combined to pay the Companies less than was their due by resorting to the process of making up two or three parcels into one, called an inclosure. These decisions are that 'packed parcels' are of the same description as inclosures, and as no extra charge was made for inclosures none could be sustained for packed parcels. All the series of cases consist of separate verdicts, founded on different sets of facts, and often on different private Acts; they therefore are not binding as adjudications in

other cases. It seems to me probable the Legislature, in 10 & 11 Vic., cap. 226, sec. 53 (1847), desired to remedy the evil of interception. If so, it follows that one charge for receiving, carrying, and forwarding is lawful, being expressly authorised by the section now in question. But if this section is found to fail I am nevertheless of opinion the Company are entitled to Judgment on their second ground of defence without any aid from that statute. Neither a principle nor authority has been adduced to show that such a mode of charging was prohibited at common law. The notion that it is unlawful as against the Plaintiffs is founded on an erroneous construction of the statutes requiring impartial equality. Plaintiffs contend the circumstances under which they pay the charge are not the same as the circumstances under which others pay it, because the benefit from the service (cartage delivery) is not so great to them as it is to some others; and they contend, in effect, that the law requiring railway companies to charge equally authorises the Judges to inquire whether the customers were benefited equally, and, if they thought not, they might order a deduction accordingly, and in that event the railway companies should be bound to analyse their charge and apportion a part of it for each part of that duty, and make a deduction of the sum appropriated to each part of that duty in respect of a customer who takes no benefit from that part. If the Plaintiffs have the right that the charge should be apportioned to the amount of benefit they derive from the service charged for, so has every other customer, because the Plaintiffs have no privilege at law as *intercepting carriers*. Such apportionment, with exactness, is not practicable. The companies have an interest in obtaining consignments of parcels direct to themselves, and to prevent interception; that interest is legitimate, and they have a right to regulate the conduct of their business for the purpose of protecting that interest. In an action the Court must give Judgment according to law, without regard to persons or their interests; and the parties have a right to try any question of fact by a Jury, and to repeat the trial as often as a new cause of action arises and they are dissatisfied with a former verdict, and to bring any question of law before a Court of Error. These

are, in my opinion, rights of inestimable importance, and parties ought not to be deprived of them by applications to a single tribunal deciding at once both fact and law by reference to what the Court may consider to be an undue prejudice to one of the parties. The Company are, in my opinion, entitled to Judgment on their second point without aid from the 10 & 11 Vic., cap. 226, as the Plaintiffs' case is not supported either by principle or authority." Judgment, by majority of Court, against the Company.—*Tried in Court of Common Pleas, Nov.* 19, 1862, *and May* 26, 1863.—*From Law Journal Reports, vol.* 32, *page* 225. The Company appealed to the Exchequer Chamber and failed, as Chief Justice Cockburn affirmed the verdict of the Court below.—*From Law Journal Reports, vol.* 33, *page* 197.

305. *Baxendale* v. *Great Western Railway Company.*—Action in respect to recovery of £443 10s. 2d., being the amount of alleged overcharges made by the Company to the Defendants for the carriage of consignments of goods under 500 lbs. weight between April 17 and November 15, 1858.

By the 7 & 8 Vic., cap. 3, sec. 50, the Great Western Railway Company are empowered, whenever they shall act as carriers, to charge for the carriage of goods, &c., such sums as they may think expedient within the limits pointed out by their Acts of incorporation, provided such charges are made to all persons equally; and section 51 authorises them to enter into such arrangements as they may think fit with reference, amongst other things, to the collection and delivery of goods. By a subsequent Act (10 & 11 Vic., cap. 226, sec. 53) the Company are empowered to charge for small parcels—"that is to say, parcels not exceeeing 500 lbs. in weight"—any sum which they may think fit.

Held—That the Company are still bound to charge equally, and cannot lawfully demand for the carriage of parcels from station to station a sum which shall include in the cost the collection and delivery, and so impose an unequal burden on those who do not require the performance of these latter services at their hands, and that money had and received will lie to recover back sums demanded and received in excess. Judgment against

the Company.—*Tried in the Court of Common Pleas, May,* 1863.—*From Scott's Common Bench Reports, vol.* 14, *page* 1.

An appeal was carried to the Court of Exchequer Chamber, where the Judgment of the Court of Exchequer was affirmed.—*Tried in the Court of Exchequer Chamber, February* 4, 1864.—*From Scott's Common Bench Reports, vol.* 16, *page* 137.

306. *Baxendale* v. *London and South Western Railway Company.*—Action for overcharge for money had and received. There were three items of claim—(1) overcharges from charging small packages under the "smalls" rate, instead of clubbing them together and charging the tonnage rate; (2) overcharges in not allowing Plaintiffs a sufficient cartage allowance for collection, delivery, and cartage in London and the country; (3) overcharges on goods intended for Isle of Wight, carried London to Southampton, charged higher proportionally than goods carried from London to Southampton, and on to the Isle of Wight, by the Company at a through rate. Plaintiffs, Pickford & Co., collected packages of goods from various senders to various consignees, and then labelled each package in large letters "Pickford & Co., Guildford Station." Plaintiffs claimed that these packages should be clubbed together and all charged at the tonnage rate. Baron Channell held that this case came under *Pickford* v. *Grand Junction Railway Company* (10 M. & W., 39), *Crouch* v. *Great Northern Railway Company* (25 L.J., 137 Ex.), and *Sutton* v. *Great Western Railway Company* (3 H. & C., 800), and the Court were clearly of opinion that on this head the Plaintiffs were entitled to recover.

In the second case the Judge said that the Company's counsel very properly admitted that he could not support the course pursued by the Company, and therefore on this head the Court also held the Plaintiffs entitled to recover.

In the third case the Company collected goods in London, carried them to Southampton, and thence per tramway and steamers to the quays at Newport and Cowes, Isle of Wight, at 20s. per ton. Plaintiffs, who carried between the same points, were charged by the Company, London to Southampton, station to station, 11s. 8d., 16s. 3d., and 19s. 7d. per ton, according to class. Plaintiffs contended that the cartage in London cost 5s.

per ton, the transit, Southampton to Cowes or Newport, 8s. per ton, and that consequently, on deduction of 13s. from the 20s. rate, the Company were exercising undue preference if they charged them over 7s. per ton, London to Southampton. They claimed as overcharge beyond 7s. per ton. Plaintiffs contended the effect of such charges was to create an inequality, and to give the Company a monopoly in a business foreign to the purpose of their constitution—see Chief Justice Cockburn in *Re Baxendale* v. *Great Western* (28 L.J., 81 C.P.), *Same* v. *Same* (32 L.J., 225 C.P.), *Garton* v. *Bristol and Exeter Railway Company* (28 L.J., 306 C.P.). Baron Channell said—"The Company are clearly entitled to do what they profess to do, viz., to carry on the business of common carriers from London to Newport, using their line for that purpose as far as it is available, that is, from London to Southampton, and acting as *common carriers* off their line beyond the Southampton terminus. When the Company avail themselves of the tramway and steamers referred to, to enable them to deliver at Newport, this is not auxiliary and subsidiary to their business as carriers on their line, but to their position as *common carriers* from London to Newport, availing themselves of their own line as far as it serves their purpose." Judgment on this head for the Company.—*Tried in Court of Exchequer, January* 22 *and* 31, 1866.—*From Law Reports, vol.* 1, *page* 137.

307. *Goddard* v. *London and South Western Railway Company.*—Action by a common carrier in respect to undue preference—that the allowance for cartage made by the Company out of the collected and delivered rate on goods traffic between Salisbury and London was insufficient, and less than the Company paid their own carriers, Messrs. Chaplin & Horne, viz., 1s. 6d. at Salisbury and 3s. 4d. in London; also, that the cartage allowances on parcels and empties traffic was in like manner insufficient. The Commissioners found that, in respect to the goods, the difference averaged 8½d. per ton, and accepted the Company's plea that this excess was given to Chaplin & Horne for services of canvassing, receiving-houses, representation, &c. Plaintiff succeeded in an order for a slight increase on parcels and empties, but practically the Judgment

was in favour of the Company; yet the Company were made to pay the costs.—*Tried in Court of Railway Commission, December* 22, 29, *and* 30, 1873, *and January* 2, 3, *and* 6, 1874.—*From Law Times Reports, vol.* 31, *page* 769.

308. *Robertson* v. *Midland Great Western Railway Company.*—Action in respect of undue preference. Plaintiffs (Fishbourne & Co.) are carting agents, and have receiving-houses in Dublin city for parcels, &c. The Railway Company carry parcels under two rates. Small parcels under 21 lbs. and under a certain size are carried at a low rate, and the carriage is paid by affixing a stamp issued by the Company. Other parcels are carried in the usual way. The Company's carting agent (J. Wallis) receives for collection and delivery to and from the Company's station, on the ordinary parcels, 1d. per parcel, and in consideration of this charge he collects and delivers the stamped parcels free. Plaintiff is paid the 1d. per parcel in like manner on parcels he collects being unstamped parcels. His claim is that he should be paid 1d. per parcel also on stamped parcels he collects. The Railway Commissioners held there was no undue preference. Judgment for Company.—*Tried in Court of Railway Commission, August* 5, 1876.—*From Law Times Reports, vol.* 35, *page* 636.

RAILWAY COMPANIES PERFORMING CARTAGE AND REFUSING TO ALLOW CARTING AGENTS (CARRIERS) TO PERFORM SUCH SERVICE.

	Case No.		Case No.
Parker v. *Gt. Western* (1844) ...	296	*Pickford* v. *Caledonian* (1866) ...	310
Garton v. *B. & Exeter* (1859)	385	*Parkinson* v. *G. W.* (1871) ...	311
Baxendale v. *West Mid.* (1862)	309	*Fishbourne* v. *G. S. & W.* (1875)	313
Wannan v. *S. C.* (1864)	312		

DIGEST.

In *Parker* v. *Great Western* (1844) the Company refused to make any allowance for cartage, but were willing to perform for him all the things which formed the consideration for the charge, but which in fact he per-

formed for himself. Held—That the Company were not justified in withholding the cartage allowance.

In *Garton* v. *Bristol and Exeter* (1859) Wall, the Company's carting agent, had a receiving-house in Bristol city, and goods delivered there after 5.15 p.m. were carted to the station by Wall, who charged cartage for doing it, and such goods were sent forward by train same night; whereas the Company's station was closed against Plaintiff at 5.15 p.m. Thus Wall got Plaintiff's cartage trade from him, which Chief Justice Cockburn held to be undue preference.

In *Baxendale* v. *West Midland* (1862) goods carried at "carted rates," Bristol to Kidderminster, consigned to "care of Pickford," the Company refused to deliver to Pickford at the station, and persisted in delivering them to consignees. Goods not addressed to any consignee, but "marked," and also consigned to "care of Pickford," the Company delivered to Pickford's office in the town. The Lord Chancellor, on appeal, gave Judgment against the Company.

In *Wannan* v. *Scottish Central* (1864) Plaintiff, a carrier at Perth, lodged general orders from consignees, desiring that he should cart their goods from the station. The Company refused to comply. Lord Justice Clerk said —"It is in the option of the Company to do so or refuse to do so, and if they refuse to all persons indifferently it is certainly clear that they are not offending against the provisions of the second section of the Traffic Act." Lord Benholme said—"I think the Company were not obliged to fulfil such orders. They can stand upon this, that they are not bound to do more than deliver according to the address." Judgment for Company.

In *Pickford* v. *Caledonian* (1866) Plaintiff complained that goods consigned to his care in Glasgow for delivery were delivered by the Company's carting agent. Lord Justice Clerk, in substance, held that the goods were not addressed to care of Pickford, and the insertion of "P. & Co." on the invoices received in Glasgow from

the Midland Railway Company was not sufficient. He held it was the duty of the Caledonian Company to deliver the goods to the consignees at the places to which the goods were addressed in Glasgow.

In *Parkinson* v. *Great Western* (1871) Plaintiff lodged a number of written orders from consignees of goods in Cirencester, ordering that the Company should give the goods of these persons to Plaintiff to deliver from the station. The Company refused to comply, and delivered the goods by their own carts. Justice Willes held the Company have a right to deliver goods, but have no right to give themselves an undue and unreasonable advantage, because in doing so they take away from the facilities afforded to the public. Judgment against Company.

In *Fishbourne* v. *Great Southern and Western* (1875) Plaintiffs delivered to the Company goods they had collected, and consigned them "To the care of F. & Co.," intending through their agents to perform the cartage from the terminal destination station to consignee's house. The Company refused to recognise this, and delivered the goods by their own agents. The Railway Commissioners gave Judgment against the Company.

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309. *Baxendale* v. *West Midland Railway Company.*—Action by carrier to receive goods at the station when consigned to his care. The Company ceased to employ Pickford & Co. (Baxendale), Plaintiffs, as carting agents at Kidderminster and Witney, and employed another carting agent. Goods arriving invoiced and addressed to care of Pickford. The Company refused to give to Pickford at the stations, and delivered said goods by their new carting agent to consignees, as the rate was a delivered rate. Goods "under mark" consigned to Pickford the Company also refused to deliver to Pickford at the stations, but carted them to Pickford's place of business in each town, where they were refused, and afterwards brought back to the stations and subsequently delivered to Pickford at the stations, and cartage charged and paid under protest. The Plaintiff filed a bill in the Court of Chancery,

praying for a declaration that the Company were bound to deliver to him the goods consigned to him, deducting for his services in cartage a sum from the through rate charged by the Company for that service. The Company contended the Plaintiff's remedy was not in the Court of Chancery, and even if it were the nature of the relief is not such as a Court of Equity will grant. If there be no remedy at law there is none in equity. The goods for Kidderminster came from Bristol, and the Company contended there was no contract whatever with them, but that the contract was with the Midland Company at Bristol.

Vice-Chancellor Stuart said—"Looking at all the allegations in the bill, I think it is alleged in substance upon the bill, and in terms sufficiently precise, that the Company have undertaken to carry and deliver goods for the Plaintiff, and have so performed their duty as to the delivery of the goods as to violate that right which the Plaintiff and every other member of the public has, namely, to have goods delivered according to the address which the goods have." Verdict against Company. —*Tried in Vice-Chancellor Stuart's Court, June* 24 *and* 25, 1862.—*Law Times Reports, vol.* 6, *page* 679.

The Company appealed to the Lord Chancellor, and Lord Westbury heard the case. On the appeal the decision was affirmed, but without prejudice to any question of jurisdiction at the hearing. The jurisdiction arises with reference to the obligations of companies to abide by direction of the Acts of Parliament under which they are constituted, and the right of the Court to confine them by injunction within the limits of those duties.—*Tried before Lord Chancellor Westbury, November* 5, 1862.—*Law Times Reports, vol.* 7, *page* 297, *and vol.* 6, *page* 678.

310. *Pickford & Co.* v. *Caledonian Railway Company.*—Action for undue preference. The Plaintiffs (Pickford & Co.) complained that at the Company's (Caledonian) station at Glasgow the firm of Cameron & Co. (the Company's carting agents) had facilities for sorting arrival goods in sections for different cartage districts of the city, and that such accommodation was denied to them (Pickford & Co.).

Lord Justice Clerk said, in substance, that during October and November, 1862, Cameron & Co. had an average of 152 tons and 141 tons of goods daily to deliver, while during the same period Pickford & Co. had 9 tons and 15 tons daily to deliver. "Now, an arrangement to divide goods into districts may be an extremely desirable and proper thing where there is an immense quantity of goods, and a very unnecessary and useless thing where there is a small quantity. But, still further, it must be kept in mind that the Caledonian Company make use of their own premises for the purpose of assorting these goods, in order to enable their own carters the more readily to get them away from the station. But they are not bound, so far as I can see, for that reason to lend their premises to other carters for the purpose of assorting their goods. A thing may be very reasonable and proper to be done by the Railway Company themselves within their own premises, with a view to speedy and accurate delivery within the city of Glasgow, which they are not in the least degree bound to communicate to other people. These people, if they desired to have such a division of their goods, may make it for themselves, with premises of their own. I cannot hold that this is what the statute calls an undue and unreasonable preference of the one party, or an undue and unreasonable prejudice and disadvantage to the other, and therefore I think there is no case under this head of the petition."

The second head of the petition was in respect to a monthly ledger account given to other persons and denied to Pickford & Co. The Judge said—"All that it is necessary to say upon that head is that not one word of evidence has been offered in support of it, and therefore there is no more to be said about it."

The next complaint was that a small box like a sentry-box, in the station, which had been used as a writing place by Pickford & Co. when they acted as carting agent for the Company, had been taken from them, and it had been given to Robb & Co., who had succeeded Pickford & Co. as Company's carting agent, and also a similar box was given to Cameron & Co., another Company's carting agent. The Judge said—"It is just as plain that, no more than the other case to which I have

referred, can this by any reasonable construction be brought within the words of this Act of Parliament."

The next complaint was that in sixty-two cases where goods which either arrived in Glasgow labelled, consigned, or addressed to Pickford & Co.'s care, or with respect to which the consignees thereof directed them to hand over the same to the petitioners for delivery, they were not delivered to Pickford & Co., but were carted to consignee's address in Glasgow by the Company's carting agents. It appeared only seven of these cases had any evidence to support them, but the packages were not labelled or addressed to Pickford & Co. On the invoices to Glasgow, in the column "To whose care," was inserted "P. & Co." It was not alleged that the sender authorised this. The invoices were from the Midland Railway Company. The Judge said—"Are the Midland Company entitled to bind the Caledonian Company, merely because they choose to put these letters there, to deliver these goods only to Pickford & Co., when the sender of the goods, who has the true title to tell them how they are to be delivered, desires (by the address) that they shall be delivered at 205, Argyle Street, Glasgow? It appears to me the Caledonian Company would not have been justified in attending to such marks as these. I think there is no evidence whatever to show that delivery to Pickford & Co. was refused of goods consigned to them." The Judge, however, agreed there was one consignment Pickford & Co. ought to have had, but he did not consider one case sufficient to establish a practice. Judgment for Company.—*Tried in Court of Session (Scotland), May* 3, 1866.—*From Neville and Macnamara's Reports, vol.* 1, *page* 252.

311. *Parkinson* v. *Great Western Railway.*—Action by a common carrier arising from undue preference. Plaintiff was a carrier at Cirencester, and a number of consignees, his customers, gave the Company general written orders, which were lodged by Plaintiff, that he was to cart all their goods from the station. The Company declined to act upon these general orders, and required a specific order for each consignment. As Plaintiff could not possibly lodge specific orders for each consignment, the Company delivered the goods by their

own carting agent, Budd, and this constituted the undue preference for which relief was sought. Justice Willes said—"When we turn from the statute to the decisions, we find this point considered in three cases, in which it has been decided that a railway company, when they are also common carriers off the railway, have no right to throw obstructions in the way of other common carriers. That has been carried so far that in one case, where a company advertised that no additional charge was made for delivery, this Court held that this was giving themselves an undue preference and subjecting other carriers to undue prejudice and disadvantage. That being so, it appears to me that the Company have done what they had no right to do in throwing difficulties in the way of Plaintiff. The Company have no doubt a right to receive and deliver goods if they think proper, and make a charge for so doing; but they have no right to give themselves an undue or unreasonable advantage in respect to such traffic, because in doing so they take away from the facilities afforded to the public. On the whole, it appears to me plain from the statute, as established by the decisions, that the Company have no right, in respect to traffic off the railway, to seek to prevent members of the public from availing themselves of the railway in the way that suits them best." Justices Byles and Keating concurred. Judgment against Company.—*Tried in Court of Common Pleas, June* 10, 1871.—*From Law Times Reports, vol.* 24, *page* 830.

312. *Wannan* v. *Scottish Central Railway Company.*—This was a case where Alexander Wannan, a carrier at Perth, took action against the Scottish Central Railway Company, under the Traffic Act, for undue preference, inasmuch as general orders lodged by him from consignees, desiring that he should cart their goods from the station to the town, were disregarded, and the traders' goods were carted by the Company's carting agent. Plaintiff failed to bring the case under Traffic Act. Lord Justice Clerk said—"There is no undue preference; it is simply the Railway Company saying, 'We cannot take these general directions, as it is a great inconvenience to us to fulfil them.' In this respect these general orders are like boxes which many large establishments have at the Post Office. These

boxes are a very great convenience to the parties who have them, and probably save a deal of time to the Post Office officials. But the Post Office authorities are under no obligation to allow them; their duty is to deliver all letters according to their address, while at the same time it is quite within their power of convenience for themselves to accommodate the public in this way. And if the Railway Company in like manner found that they could, consistently with their arrangements and interest, agree to take general directions from traders as to the delivery of goods, they would do so; *but it is in their option to do so or refuse to do so*, and if they refuse to all persons indifferently, it is certainly clear that they are not offending against the provisions of the second section of the Traffic Act." Lord Benholme concurred, saying—"I think the Railway Company were not obliged to fulfil such orders; they can stand upon this, that they are not bound to do more than deliver according to the address." Lords Cowan and Neaves concurred. *Tried in the Second Division of Court of Session (Scotland)*, 1864.

313. *Fishbourne* v. *Great Southern and Western Railway Company (of Ireland).*—Action for undue preference in diverting goods, whereby the carting agent lost the cartage delivery. Fishbourne & Co. delivered to the Great Southern and Western Railway Company, at their station, goods for conveyance, addressed to the consignees. With such goods a consignment note was handed on which was written "To the care of F. & Co." The Company refused to recognise and act upon this, and delivered the goods at terminal station by their own agents or other carting agents. Held—That the words "To the care of F. & Co." imported that the goods, on their arrival at the terminal stations, were to be given to Fishbourne & Co. or their agents for delivery to the consignees; that, as between the Railway Company and Fishbourne & Co., the latter were the senders, and that the Railway Company accepted the goods upon the terms stated in the consignment note, not being at liberty to employ their own or other carriers to deliver the goods from their railway to the consignees, and should have delivered the same to Fishbourne & Co. or their agents.

Judgment against the Company.—*Tried in Court of Railway Commission, July* 31 *and August* 11, 1875.—*From Neville and Macnamara's Reports, vol.* 2, *page* 224.

UNDUE PREFERENCE—ADMITTANCE OF OMNIBUSES AND CABS INTO STATION YARDS—INEQUALITY OF PASSENGER FARES.

	Case No.		Case No.
Hozier v. *Caledonian* (1855) ...	404	*Barratt* v. *Great Northern* (1857)	757
Barker v. *Midland* (1856)	314	*Jones* v. *Eastern Counties* (1858)	405
Caterham Railway v. *L.B. & S.C.* (1856)	315	*Ilfracombe P. C. Co.* v. *L. & S. W.* (1868)	319
Painter v. *L. B. & S. C* (1857)...	316	*Toomer* v. *L. C. & D.* (1877) ...	779
Beadell v. *Eastern Counties* (1857)	317	*City of Dublin S.P.Co.* v. *L.&N.W.* (1881)	320
Marriott v. *L. & S. W.* (1857) ...	318		

DIGEST.

In *Hozier* v. *Caledonian* (1855) Plaintiff complained of the inequality of passenger fares, Edinburgh to Glasgow, as compared with those, Motherwell to Edinburgh or to Glasgow. Lord President M'Neil said—The statute provides for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain." Judgment for Company.

In *Caterham Railway* v. *London Brighton and South Coast* (1856) Plaintiffs complained the passenger fares, London to Caterham, were not in proportion to the fares charged by Defendants to other places on their own line. Justice Cresswell said that all persons travelling between Caterham and London were charged the same, and held the charges made between other places were not applicable in respect to undue preference. The Judge would not interfere in the complaint that a sufficient number of London Brighton and South Coast Company's trains did not stop at Caterham Junction; nor in the complaint that third class return fares were not issued, London to Caterham. Judgment was, however, given against the Company

on the fourth complaint, that a convenient covered station was not provided at Caterham Junction, and, as such accommodation was provided at other London Brighton and South Coast stations, it was undue preference.

In *Barker* v. *Midland* (1856) the Company prevented Plaintiff driving his omnibus in their Stamford station yard to set down and take up passengers. Chief Justice Jervis said—"Plaintiff has no right to make a contract (with his passengers) for the use of the Company's private property." Justice Crowder said—"The action is not brought by anybody who wished to go by the railway or send his goods; he is not therefore within the regulations made for persons who use the railway for themselves or their goods."

In *Barratt* v. *Great Northern* (1857) Plaintiff claimed to be booked through from King's Cross to Settle. This the Company refused to do. The Company held not liable to issue a through ticket on to another Company's line because the two lines are continuous, no case of public inconvenience having been made out.

In *Marriott* v. *London and South Western* (1857) the Company refused to let Plaintiff's omnibus into their station yard at Kingston to take up and put down passengers, while at the same time they allowed an omnibus belonging to one Williams such access. Chief Justice Cockburn held this to be undue preference within the Act.

In *Beadell* v. *Eastern Counties* (1857) Plaintiff's two hackney cabs were not allowed by the Company into their Shoreditch station to ply for hire, because the Company, for a sum of £600 a year, confined the privilege to one Clark. Justice Cresswell held that in *Marriott's Case* he was prevented setting down passengers at the door of the booking-office, while here the object was to ply for hire from the station. In *Marriott's Case* the decision rests expressly upon the inconvenience inflicted upon the public, not upon the

particular grievance to the Plaintiff. Judgment for Company.

In *Painter* v. *London Brighton and South Coast* (1857) a fly proprietor at Brighton complained he was not allowed access for his flys into the Brighton Station, while an exclusive right was granted to some other fly proprietors. Justice Williams said the complaint must come from those who use the railway. Judgment for Company.

In *Jones* v. *Eastern Counties* (1858) the Court of Common Pleas refused to grant a rule for an injunction to compel the Company to issue season tickets between Colchester and London on same terms as was the custom between Harwich and London, the plea being undue preference.

In *Ilfracombe Public Conveyance Company* v. *London and South Western* (1868) Plaintiffs complained their omnibus was not allowed into the Company's Barnstaple station, while the omnibus of one Pridham was allowed in. The Lord Chief Justice said it must be clearly shown the course complained of occasioned inconvenience to the public, and that regard must be had to the general convenience of the public rather than the wishes or interests of individual job-masters. Judgment for Company.

In *Toomer* v. *London Chatham and Dover and South Eastern Companies* (1877) the Railway Commissioners ordered the two Companies to run certain trains on the spur line of 17 chains connecting the two Strood stations of the two Companies. The Court of Exchequer Division overruled this, holding the Commissioners had no jurisdiction.

In *City of Dublin Company* v. *London and North Western* (1881) the Plaintiffs complained of undue preference, inasmuch as the fares for passengers from the North Wall route (by London and North Western Company's steamers) to London were disproportionately lower than the fares from Westland Row (Dublin)

by Plaintiffs' mail steamers from Kingstown, while the class of accommodation, speed, and service were nearly equal. The Railway Commissioners held that the fares by the North Wall route should be only 10 per cent. less than by the mail route.

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314. *Barker* v. *Midland Railway Company.*—Action under the Railway and Canal Act for withholding reasonable facilities by preventing Plaintiff driving his omnibus into the station yard at Stamford to set down and take up passengers. Chief Justice Jervis said—"As I understand the first count, they proceed upon the notion that the station is the private property of the railway, subject to a qualified right of the public to go over it in order to use the railway. Now it is not pretended the Plaintiff himself uses the railway, but that he carries persons who do so, and he has no right to make a contract for the use of the Defendants' private property. It is said the Railway and Canal Act does not take away the common law remedy. It certainly gives no remedy to support the count said to be founded upon it." Justice Crowder said—"This is not an action brought by anybody who wished to go by the railway or send his goods by it, but by a person who makes it his business to bring passengers and goods to the station, and I therefore think that he is not within the regulations made for persons who use the railway for themselves or their goods." Justices Cresswell and Willes concurred. Judgment for Company.—*Tried in Court of Common Pleas, May* 6, 1856.—*From Law Journal Reports, vol.* 25, *page* 184.

315. *Caterham Railway Company* v. *London Brighton and South Coast Railway and South Eastern Railway.*—Action in respect of undue preference in accommodation of trains between London and Caterham and inequality of fares, and that third class return tickets were not issued, and absence of shed for passengers at Caterham Junction. The Plaintiffs were the Caterham Railway Company and the Defendants the London Brighton and South Coast Railway and the South Eastern Railway. The London and Brighton Company own the line from New Cross to Caterham Junction, where the latter railway

branches off for five miles to Caterham. The South Eastern own the line from London to New Cross. Justice Cresswell's Judgment, as follows, illustrates the points at issue:—

Complaint 1.—Unequal fares per mile charged to the Caterham Branch compared with the fares charged by the Companies to other places on their lines.

The Judge said—"No inequality is complained of in the fares going to Caterham Junction (from London) as compared with the fares charged for other distances on the London and Brighton line, and it is not enough to show an inequality as compared with the rates charged on another line (Caterham Railway). The words of the section are—

'No such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantag in any respect whatsoever.'

It cannot be said that because persons may travel for a less charge between Epsom and London than they can between Caterham and London, any undue or unreasonable preference is given to any particular person or company, or that they are subjected to any undue or unreasonable prejudice or disadvantage. All persons travelling from Caterham to London are charged the same."

Complaint 2.—That a sufficient number of trains are not allowed to stop at the Caterham Junction, and the times of stopping are inconvenient.

"It is not shown there is any other station on the line of a similar character, and to which the traffic is of the same description, at which greater facilities are given; and I think no sufficient case is made out for our interference on that ground."

Complaint 3.—That the Companies refuse to issue third class return tickets to Caterham.

"By the time table it appears that third class return tickets are not issued to any station on the line below Croydon. There will, therefore, be no rule on that ground."

Complaint 4.—The absence of a convenient covered station at the Caterham Junction.

"I think the absence of such accommodation subjects passengers on the Caterham line to undue prejudice and inconvenience, and it appears there are covered stations at all the other places on the line. As to that, the rule may go." Judgment for Defendants in 1st, 2nd, and 3rd complaints, and for Plaintiffs in 4th complaint.—*Tried in Court of Common Pleas, November* 28, 1856.—*From Neville and Macnamara's Reports, vol.* 1, *page* 32.

316. *Painter* v. *London Brighton and South Coast Railway Company.*—Action in respect to undue preference, inasmuch as certain fly proprietors were not allowed to take their flys into the Company's Brighton station. The Railway Company granted exclusive permission to a limited number of fly proprietors to ply for hire within their station. The Court refused to grant a writ of injunction against the Company under the Railway and Canal Traffic Act, 1854, at the instance of a fly proprietor who was excluded from participation in this advantage, although it was shown by the Complainant, and by several other fly proprietors who were likewise excluded, that occasional delay and inconvenience resulted to the public from the course pursued. Justice Williams said the complaint must come from those who use the railway.—*Tried in Court of Common Pleas, June* 9, 1857.—*From Neville and Macnamara's Reports, vol.* 1, *page* 58.

317. *Beadell* v. *Eastern Counties Railway Company.*—Action by Plaintiff (a proprietor of two hackney cabs) to have access to ply for hire at Shoreditch (London) station yard. The Company refused permission on the ground that they had granted an exclusive privilege to a Mr. Clark to take up passengers at their station, for which they received £600 a year from him. Plaintiff contended this was an undue preference given to Clark, and imposing an undue and unreasonable prejudice on him (Plaintiff). It appeared the Company allowed cabs to come into the yard and set down passengers, but they were then compelled to leave the yard. Plaintiff contended it was a similar case to *Marriott* v. *London and South Western*

Railway Company, but this the Company denied. Justice Cresswell said—"In *Marriott's Case* the Plaintiff was prevented by the Company from setting down his passengers at the door of the booking-office. Here the only complaint is the Plaintiff is not permitted to ply for hire in the station yard. The case of *Barker* v. *Midland Railway* has some bearing upon this. There the Court held that an omnibus proprietor who carried passengers and their luggage for hire to and from a railway station could not maintain an action against the Company for refusing to allow him to drive his vehicle into the station yard. I am of opinion the Plaintiff has made out no case for the exercise of our jurisdiction under the statute."

Justice Williams said—"There is no suggestion here, as was in *Marriott's Case*, that there is not ample accommodation for the public. In *Marriott's Case* (see Case 318) the decision rests expressly upon the inconvenience inflicted upon the public, not upon the particular grievance to the Plaintiff. I think it is by no means an unreasonable thing, but, on the contrary, very important to the interests of the public, that the vehicles which ply for hire in the station yard should be kept upon their good behaviour by being under the control of the Company. The affidavits upon which this motion is founded do not show that the agreement with Clark is not highly beneficial to the public as well as to the Company, and it has been expressly laid down in a case which has not been cited, *Barratt* v. *Great Northern Railway Company* (26 Law Journal Reports, 83 C.P.), that the statute in question was passed for the benefit of the public, and not for that of individuals." Judgment for Company.—*Tried in Court of Common Pleas, June* 1, 1857.—*From Neville and Macnamara's Railway Cases, vol.* 1, *page* 56; *also Law Journal Reports, vol.* 26, *page* 250.

318. *Marriott* v. *London and South Western Railway Company.*—Action to obtain access for an omnibus into the Kingston Station. Plaintiff ran an omnibus between Kingston Station (London and South Western) and Twickenham Station (Richmond and Windsor), running through Teddington, Hampton Wick, and the old town of Kingston-on-Thames. On the 15th November he was prevented driving his omnibus

into the station yard, whereby passengers had to walk and luggage carried, exposed to the weather, a distance of 72 feet. Plaintiff pleaded undue preference, as a coach running between Horsley and Leatherhead and Kingston was allowed in, and so likewise was an omnibus running to the old town of Kingston-on-Thames. The Company pleaded that the station yard was the property of the Company, and that there was undue competition between Plaintiff and Williams, and that Williams' omnibus was sufficient for the requirements of the traffic. Chief Justice Cockburn held that "this case falls within the terms of the statute as a case of undue and unreasonable preference and advantage to a particular person, and the Company must admit the omnibus of Plaintiff into their station at all reasonable times for the purpose of forwarding, receiving, and delivering traffic upon and from their railway, and in the same manner and to the same extent as other vehicles of a similar description. There may be cases where, from want of space, a Company can only admit a limited number of vehicles to compete for the traffic to and from their railway, but there is nothing of the kind shown here." Judges Cresswell, Williams, and Crowder concurred.—*Tried in Court of Common Pleas, Hilary Term*, 1857.—*Law Journal Reports, Common Pleas, vol.* 26, *page* 154.

319. *Ilfracombe Public Conveyance Company* v. *London and South Western Railway Company.*—Claim of undue preference. Plaintiffs owned omnibuses and flys which plied from the Company's Barnstaple station to Ilfracombe. One Pridham carried on a similar business, and was allowed, by an arrangement with the Company, to drive his carriages into the Barnstaple station yard, and take up passengers from every train which arrived; whereas Plaintiffs were compelled by the Company to keep their carriages outside the gates, 300 yards distant from the station.

The Lord Chief Justice said that it was much for the convenience of the public that railway companies should make arrangements for the attendance of a sufficient number of carriages for the conveyance of passengers arriving at their stations. If anyone indiscriminately might bring his carriages

for that purpose, it would give rise to great confusion and obstruction; that in all these cases, therefore, it must be clearly shown that the course complained of occasioned inconvenience to the public, which was not shown by the affidavits produced; and that regard must be had to the general convenience of the public rather than to the wishes or interests of individual job-masters. And with regard to *Marriott's Case*, Justice Willes said that the decision had been explained on a subsequent occasion *(Beadell* v. *Eastern Counties)* in the way put by the Chief Justice. Judgment for Company.—*Tried in Court of Common Pleas, November* 19, 1868.—*From Neville and Macnamara's Reports, vol.* 1, *page* 61.

320. *The City of Dublin Steam Packet Company* v. *London and North Western Railway Company.*—Action in respect to undue preference under the Railway and Canal Act, 1854. Steamers were provided and worked for the conveyance of mails and passengers between Holyhead and Kingstown by the Dublin Steamboat Company, under statutory powers and agreements obtained and made between that Company and the North Western Railway Company. It was agreed that the charge for conveyance of passenger traffic by such route (called the mail route) between Kingstown and London, &c., should be fixed as regards the through rates by the London and North Western Company. The London and North Western Company subsequently established a service of steamers for passengers between Holyhead and the North Wall, Dublin (called the North Wall route). The effect of the statutory agreement between the two Companies was to give the London and North Western Company a complete control over the fares of both routes, as if they were sole owners of both, and therefore the provisions of the Railway and Canal Traffic Act, 1854 (which were made expressly applicable to both those lines of steamers) applied to both routes. The London and North Western Company's service of steamers was almost on a level with the mail service in point of speed and accommodation, and its fares were much lower, the first and second class passengers, who were charged 60s. and 45s. respectively between Euston and Dublin by the mail route, being only charged 47s. 6d. and 36s. 6d. by

the North Wall route, being a difference of 12s. 6d. and 8s. 6d. respectively. The services over the distance between Holyhead and Dublin were substantially the same, and (adding the railway from Kingstown to Dublin) were nearly equal. The accommodation by the North Wall route was practically as good as that by the mail, and the vessels of the two Companies were worked at about the same cost.

The mail through fares were divided by mileage, and the London and North Western Company received for their land portion of the through service 46s. 10d. out of the first class fare and 35s. 3d. out of the second class, their North Wall fares (railway and steamer combined) being 47s. 6d. first class and 36s. 6d. second class. In both cases they carried the passengers the same distance by railway, but the passengers to and from North Wall travelled in addition by the Railway Company's steamboat. Their boat fare was 8s. first or second class, and they received therefore in respect of the North Wall passengers 39s. 6d. first class and 28s. 6d. second for the railway journey from London to Holyhead, as against 46s. 10d. and 35s. 3d. for the same railway journey in respect of the mail route.

Held—That the amounts by which the fares by the mail route were thus more than those by the North Wall route (whether in regard to the fares charged for the entire service to Dublin or the portions due to the land journey only) were excessive, and an undue prejudice to the traffic by the former route; and that the circumstances did not justify an excess of the total fares to Dublin by the mail route more than, at the outside, 10 per cent.

An application by the Dublin Steamboat Company for through rates for passengers from Kingstown and London, *via* the Company's steamers and London and North Western trains, was refused on the ground that the Dublin Steam Packet Company had agreed (under statutory powers) that the charges for the conveyance of passengers between London and Kingstown were to be fixed from time to time, as regards the through rates, by the Railway Company. *Semble*—That a company or persons using or working steam vessels for the purpose of carrying on a communication between any towns or ports are

entitled to apply for through rates under section 11 of the Regulation of Railways Act, 1873.

A railway company is not under any obligation to issue a through ticket, or any ticket not forming part of the through service.

Upon complaint by the Dublin Steam Packet Company that the London and North Western Company had not complied with section 16 of the Regulation of Railways Act, 1868, which enacts (*inter alia*) that "where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway," it was admitted by the London and North Western Railway Company to be so; but as the Dublin Steam Packet Company did not show that such non-compliance had caused any damage to themselves, the Commissioners made no order. Judgment against the Railway Company.—*Tried in Railway Commission Court, August* 3, 4, 5, 6, *and* 19, 1881.—*From Solicitors' Journal, vol.* 26, *page* 262.

COMPULSORY USE OF THE RAILWAY COMPANY'S PRINTED FORM OF CONSIGNMENT NOTE CONTAINING CONDITIONS OF CARRIAGE.

	Case No.		Case No.
Garton v. *B. & E.* (1861)	321	*Baxendale* v. *B. & E.* (1862) ...	322

DIGEST.

In *Garton* v. *B. & E.* (May, 1861) the Company refused to accept the Plaintiff's (a carrier) consignment notes, and insisted upon filling up by their servants their usual printed form of consignment note, with the conditions of carriage attached, and required Plaintiff to sign same. It appeared one of the printed conditions on the notes had been held bad in law as (see *Simons* v. *Great Western*), "unjust and unreasonable." Chief Justice Cockburn, holding this condition "unjust and unreasonable," decided that Plaintiff could not be required to sign a note with such condition.

In *Baxendale* v. *B. & E.* (January, 1863) the Company required Plaintiffs to use and sign their printed form of consignment note, with "conditions" attached. Mr. Wall, the Company's carting agent, who also kept a receiving-house in the city of Bristol, did not require the public bringing him goods, as the Company's agent, to use and sign such notes. Judgment against the Company.

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321. *Garton* v. *Bristol and Exeter Railway Company.*—*First Count*, 40*s. damages.*—On the 4th March, 1858, and divers other times, Plaintiff tendered to the Company at Bristol goods, together with the proper charge, and a note in writing of the names of sender and consignee, description, and weight. The Company refused to receive and carry unless Plaintiff would sign the Company's printed form of forwarding note, filled up by the Company's servants, and referring to certain conditions indorsed thereon (the fourth condition being one of sixteen, and as follows):—

"The Bristol and Exeter Railway give public notice—(4th.) That they will not be answerable for the loss of or damage to any goods arising from fire, civil commotion, tempest, or the act of God; nor for loss, detention, or damage of wrappers, boxes, or returned empties of any description; nor for any goods put into returned wrappers, boxes, or empties; nor for any goods left until called for, or to order, or left or warehoused for the convenience of the parties to whom they are consigned; nor for the loss, detention, or damage of any package insufficiently or improperly packed, marked, directed, or described, or containing a variety of articles liable by breakage to damage each other; nor for leakage arising from bad casks or cooperage; nor for damage to cast-iron work, furniture, or other goods of a slight construction. And they give notice that no claim for damage will be allowed unless made within three days after delivery of the goods, nor for loss unless made within three days of the time that they should be delivered."

Chief Justice Cockburn held that the condition "for the loss, detention, or damage of any package insufficiently or improperly packed, marked, directed, or described," was an unjust and unreasonable condition, both at common law and under the Railway and Canal Traffic Act, 17 & 18 Vic., cap. 31. A similar condition in the case of *Simons* v. *Great Western Railway Company* (18 C.B., 805) was held to be bad. Chief Justice Jervis, during the argument in that case, said—"What has the

insufficiency of the package to do with the detention of the goods?" The Judge also held that "no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within three days of the time that they should be delivered," was unjust and unreasonable. The arbitrator appointed by the Court assessed the damages in this count at 40s.

Second Count, for £270 damages.—The Plaintiff, a common carrier, complained that the Company had lately appointed a Mr. Wall to be their carting agent; that the Company refused to receive from them goods after 5.15 p.m., while they received them after that time from Mr. Wall, and forwarded them by the trains the same night; that this unfair practice prejudiced Plaintiff with his customers.

Chief Justice Cockburn held—That the Company here again imposed a condition on which they had no right to insist, and Plaintiff was entitled to the verdict of the Court.

Claim, £30 2s. 6d., alleged overcharges on packages under 500 lbs. charged as "smalls," and £27 11s. 6d., alleged overcharges on packages over 500 lbs. also charged as "smalls." All the overcharges had been paid under protest.

The Court held—That by 6 Will. IV., cap. 36, the Bristol and Exeter Railway Company was incorporated, and the Company were empowered to charge for the carriage of parcels. By 8 & 9 Vic., cap. 155, sec. 19, amending the 6 Will. IV., cap. 36, the Company were authorised to charge at so much per ton per mile. This provision overrides the provisions of 6 Will. IV., cap. 36, so far as concerned parcels exceeding 500 lbs. in weight, but not as to parcels below that weight. The Company obliged the Plaintiff to pay more than the maximum amount allowed by 8 & 9 Vic., cap. 155, sec. 19. Held—That the excess paid on all parcels exceeding 500 lbs. in weight may be recovered back. Judgment for Plaintiff for the £27 11s. 6d.

Claim, £2 14s. 9d., for the reasonable cost of collection and delivery of certain parcels Plaintiff carted, and which cartage was included in the rate. Chief Justice Cockburn said —"Can you distinguish this from *Baxendale* v. *Great Western Railway* (5 Com. B., N.S., 336)? You charge to the full extent for the carriage of the goods, and in addition to that

you charge for collecting and delivery services, which the arbitrator finds were not performed by you." Verdict for Plaintiff on this claim.

Action for £20 10s., made up of two classes of items. (1) The rate for Manchester packs, Manchester to Bristol, was 30s. per ton. The Midland Railway Company allowed to the Bristol and Exeter Company 1s. 6d. per ton cartage. The Bristol and Exeter Company paid their carting agent, Mr. Wall, a higher sum per ton. The local rate, Bristol to Exeter, was 22s. 6d. per ton, delivered. Plaintiff contended that the Defendants, by cartage allowances from Midland Company at Bristol, were enabled to *deliver* packs in Exeter to consignees at 21s. 8d. per ton. Held—That Plaintiff was not entitled, in an action for money had and received, to recover from the Company the excess of the sums paid by him above those paid by other persons.

(2) Owing to certain traffic going from Bristol to Bridgewater by water, the Company made a special rate with certain Bridgewater traders to carry their goods (other than tea or tobacco) at 6s. per ton, provided they sent all their goods by the rail and gave up the water carriage. The ordinary class rates charged Plaintiff during the same period (1856, 1857, 1858, and 1859) were—1st, 6s. 8d.; 2nd, 8s. 4d.; 3rd, 12s. 6d.; 4th, 16s. 8d. Plaintiff claimed a rebate on these grounds. Held the same as in the previous case.

Fourth claim, £38, for packages charged as "smalls." A verdict for £6 9s. 2d. was given in this case upon such consignments as, being over 500 lbs., were controlled by the Company's Act 8 & 9 Vic., cap. 155, sec. 19, and should have been charged at the tonnage rate.

Fifth claim, £6 12s. 2d., alleged overcharges. Plaintiff contended that a person not a carrier delivering to the Company several small packages over 500 lbs. in the aggregate, and of the same description of goods, the Company charged them at the tonnage rate when from one sender and to one consignee. Plaintiff delivered a number of small packages over 500 lbs. addressed to his agents (a single consignee) at different stations. He admitted such parcels were ultimately intended for different consignees, but the addresses were covered, or

partially covered, by his printed address labels. The Company, however, charged the packages as "smalls," and refused to apply the tonnage rate.

Chief Justice Cockburn held that "the case of *Baxendale* v. *Eastern Counties Railway Company* (4 Com. B., N.S., 63) governs this case. The Court, in that case, said that where a number of separate packages are all addressed to the same person, they are easily accessible at a station, but if to a number of persons, extra trouble is involved. Here the Plaintiff brought to the Company to be carried divers packages of the same kind, at the same time. It is found by the arbitrator that these packages were all addressed to the Plaintiff, but were intended for different ultimate consignees, whose names and addresses were also to be found on the packages, though usually concealed by the Plaintiff's address, which was pasted over them." Held—That the Company were justified in so charging.

Sixth claim. This was a similar claim to No. 4, and Plaintiff recovered £1 15s. 5d. under same Act.

Seventh claim, £3 18s. 3d., consisted of legitimate overcharges, which were not contested.

Plaintiff made a general claim of £160 on the ground that the Company had not put up any boards to indicate the amount of their tolls. The Judge said—"It is very doubtful, indeed, whether they are bound to put up boards at all in respect to the conveyance of parcels and packages by their own carriages; but, at all events, we think that any payments which they received from the Plaintiff or others, on this head, cannot be recovered on a count for money had and received."—*Tried in the Court of Queen's Bench, Easter Term, May* 3, 1861.—*Best and Smith's Reports, vol.* 1, *page* 112.

322. *Baxendale* v. *Bristol and Exeter Railway Company.*—Action in respect to undue preference. Plaintiffs (Pickford & Co.) were required, before the Company would accept goods from them for carriage, to use the Company's printed consignment note forms, and sign the Company's conditions therewith attached. To get their goods forwarded Pickford & Co. were compelled to do this. Mr. Wall was

manager of the railway (Bristol and Exeter), and he was likewise an independent carrier, having a carrier's office in High Street, Bristol, where he received goods for all the railways running out of Bristol. Plaintiffs' complaint was that persons taking goods to Wall's receiving-house to go over the Bristol and Exeter Railway were not required to sign the said conditions, and consequently there was undue preference.

Chief Justice Erle said—"The question is whether Wall was a carrier distinct from the Company, or really their agent for receiving and forwarding their traffic. The passage in Wall's affidavit in which he says—'The Defendants (Bristol and Exeter Company) allow me to describe myself as agent, and my establishments, including the one in High Street, Bristol, as receiving-houses of the Defendants'—reading that passage, it seems to me that Wall's office is, as to third persons, to all intents and purposes the office of the Company, and that the effect of the arrangement was to give Wall an advantage over Messrs. Baxendale as to the carriage of goods which the law does not warrant. On this ground the Judgment must be against the Company."—*Tried in Court of Common Pleas, January* 13, 1862.—*From Scott's Common Bench Reports, vol.* 11, *page* 787.

UNDUE PREFERENCE IN RESPECT TO PACKED PARCELS.

Case No.
Sutton v. *Great Western* (1868) 387

DIGEST.

In *Sutton* v. *Great Western* (1868-69) Plaintiff was a "packed parcel" carrier, and he complained the Company charged his goods fifth class and 50 per cent. added, while they carried "packed parcels" from the London wholesale houses at the ordinary rate. Morley & Co., Copestake & Moore, Pawson & Co., and Morrison & Co. produced their books, and proved that each day they received fifty to one hundred small parcels (enclosures) from other City houses, which were enclosed in their packages to different towns, and the consignee of the package

distributed the smaller parcels packed among his own goods to his fellow shopkeepers in the same town. It was proved this practice had existed for forty years. The House of Lords, on appeal, held that there was undue preference. Lord Chelmsford said—"The Company knew perfectly well it was the constant practice of the large houses to send 'enclosure' parcels, and if the Company liked they could give such houses notice that every package the contents of which was not declared would be treated as a packed parcel and charged accordingly." Judgment against Company.

RECEIVING GOODS TO FORWARD SAME NIGHT LATER FROM ONE CARRIER (COMPANY'S OWN AGENT) THAN FROM ANOTHER.

	Case No.		Case No.
Garton v. *Great Western* (1859)	302	*Palmer* v. *L. & S. W.* (1866) ...	324
Garton v. *Bristol & Exeter* (1861)	321	*Palmer* v. *L. B. & S. C.* (1866) ...	325
Baxendale v. *L. & S. W.* (1862)	323		

DIGEST.

In *Garton* v. *Great Western* (June, 1859) the complaint was that the Company refused to accept goods from Plaintiff at their Bristol station after 5.15 p.m., that being the closing time, whereas the Company received goods from their own carting agent, Wall, up to 7 and 8 p.m. Chief Justice Cockburn held that this was undue preference under the Act.

In *Garton* v. *Bristol and Exeter* (May, 1861) Plaintiff complained that his carts were not allowed into the Company's Bristol station to deliver goods after 5.15 p.m., while the Company's carting agent, Wall, was allowed to bring goods in later. Chief Justice Cockburn held this was undue preference under the Act.

In *Baxendale* v. *London and South Western* (1862) the Company received goods at their Nine Elms station up to 6.30 p.m., and at their City receiving-houses at 6 p.m., and sometimes they could not get their own

carts from the receiving-houses into Nine Elms Station until after 6.30 p.m. Plaintiff was not allowed to bring goods in after 6.30 p.m. Chief Justice Erle held that this was undue preference under the Act.

In *Palmer* v. *London and South Western* (1866) the complaint was that Plaintiff's collecting carts were not allowed into Nine Elms Goods Station after 6.30 p.m., while the Company's collecting carts and those of Pickford & Co. were allowed in later. The Company pleaded that at their twenty-seven receiving-houses the goods were sorted, weighed, and invoiced, which could not be done by a stranger, and thus greater time was occupied. The Court were equally divided, and no rule was made.

In *Palmer* v. *London Brighton and South Coast* (1871) the complaint was that Plaintiff's collecting carts were not allowed into Willow Walk Station to deliver goods to go by the railway after 6.30 p.m., while the Company's own collecting carts were allowed in with goods as late as 7 p.m. and 7.30 p.m. Justice Keating held that this was undue preference under the Act.

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323. *Baxendale* v. *London and South Western Railway Company.*—Action in respect of undue preference, inasmuch as the Company declined to receive goods from Plaintiff at Nine Elms Station for conveyance after 6.30 p.m., whereas the Company collect goods at their own receiving-houses at Blossom's Inn, Lawrence Lane, Cheapside, and the "Swan-with-two-Necks," Gresham Street, and cart them into their Nine Elms Station as late as 9 p.m., whereby Plaintiff is prejudiced. The Company contended that they received goods at their receiving-houses up to 6 p.m., and at Nine Elms up to 6.30 p.m.; that at times they were unable to cart all their own goods from the receiving-houses to Nine Elms by 6.30 p.m.; and that the goods had been accepted by them at or before 6 p.m. at the receiving-houses. Chief Justice Erle said the case was within the principle of *Garton* v. *Bristol and Exeter Railway Company*, and the Judgment must be against the Company, with costs.—*Tried in*

Court of Common Pleas, June 17, 1862.—*Common Bench Reports, vol.* 12, *page* 758.

324. *Palmer* v. *London and South Western Railway Company.*—Action in respect of undue preference acting against Plaintiff, a carting agent. Plaintiff complained that the gates at the Nine Elms Goods Station were closed against his loaded carts at 6.30 p.m. every evening, while the Company's own vans and those of Messrs. Pickford & Co. were allowed in after that hour, and the goods forwarded same night. Thus the Company and Pickford & Co. received goods at their receiving-houses up to 7 p.m. to be sent on by rail same night, while he could not receive goods at his receiving-houses after 5.30 p.m., and that he thus stood at disadvantage before the public. Plaintiff applied to the Court for an injunction under the Railway and Canal Act, 1854 (17 & 18 Vic., cap. 31, sec. 2). The Company, by affidavits, contended that their general rule of closing the gates at 6.30 p.m. is subject to exception at the discretion of their superintendent, according to circumstances, such as goods for shipment on a ship about to sail, perishable goods, accidental delays on the road, and the like, and that Plaintiff had the benefit of this exception impartially with other customers; that they have twenty-seven receiving-houses, and that in several houses the goods are sorted and weighed and invoiced, and made fit for immediate forwarding, which cannot be done by a stranger to the Company; and that there is a reason for admitting their vans so loaded from those receiving-houses at a later hour, and forwarding goods same night.

Chief Justice Erle said—"The cases of *Baxendale* v. *London and South Western Railway* and *Garton* v. *Great Western Railway* are contended to be in point in this case. I beg to say that the argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction, the question of whether undue preference has been caused being a question of fact depending upon the facts proved in each case. I am of opinion that the grounds for this extraordinary interference (*i.e.*, an injunction) must in each instance in their nature be almost singular, and can scarcely ever afford any guidance for deciding a subsequent application for an injunction.

In my opinion the Company have done their duty in the conduct of their business, and ought not to be interfered with on the complaint now before us." The Judge then remarked that "Pickford & Co. having obtained an injunction, their vans were admitted at all hours, and the further development of this would be that the Company would be led not to forward same night any goods delivered after 6.30 p.m., to the injury of the public service. Such an injunction as that asked might be a source of private profit to Mr. Palmer, but he had no right to demand that the interests of the public or of the railway should be sacrificed for his private gain. For these reasons I think the injunction should not be granted." Justice Montague Smith concurred. Justice Willes and Justice Keating were of opinion "that the precedents which would entitle the applicant to Judgment bind us, and, moreover, that they are right." As the Court were equally divided, the rule dropped.—*Tried in Court of Common Pleas, January* 11 *&* 12, *and May* 30, 1866.—*From Law Journal Reports, vol.* 35, *page* 289.

325. *Palmer* v. *London Brighton and South Coast Railway Company.*—Action in respect of undue preference. Plaintiff, a London carrier and carting agent, having receiving-houses in the City, was not allowed by the Company to take his goods into Willow Walk Station, Bermondsey, after 6.30 p.m., to be forwarded same night. On the other hand, the Company's own collecting carts were allowed in as late as 7 p.m., 7.30 p.m., and 8 p.m., bringing packages from the Company's own City receiving-houses. The Company pleaded the rule of closing the station gates at 6.30 p.m. was equally applicable to their own vans and carts as to those of the Complainant and other carriers, and that any departure from the rule in their own favour was accidental and occasional only. (They did not plead the convenience of the public, as was pleaded in the case of *Palmer* v. *London and South Western Company.*) Justice Keating gave Judgment that Plaintiff was entitled to an injunction under the Railway and Canal Act (17 & 18 Vic., cap. 31).—*Tried in Court of Common Pleas, January* 21, 25, 28, *and February* 13, 1871.—*From Law Journal Reports, vol.* 40, *page* 133.

TERMINAL ALLOWANCES IN RESPECT TO TRAFFIC TO AND FROM TRADERS' OWN SIDINGS—LOADING, UNLOADING, &c.

	Case No.		Case No.
Thompson v. *L. & N. W.* (1875)	326	*Evershed* v. *L. & N. W.* (1877) ...	328
Bell v. *Mid., also L. & N. W.*(1875)	327	*Howard* v. *Midland* (1878) ...	329

DIGEST.

In *Thompson* v. *London and North Western* (1875) the Midland Railway Company have sidings into two breweries, and allow 9d. per ton for loading ale. The London and North Western Company, having no sidings into these two breweries, allow 9d. per ton and perform free cartage, equal to 1s. per ton. Plaintiff (a brewer) is prejudiced by this 1s. 9d. per ton. The Railway Commission granted an injunction against the Company to stop such allowance.

In *Bell* v. *Midland, also London and North Western* (1875), Plaintiff complained the Companies allowed 9d. per ton to certain brewers at Burton-on-Trent, who had sidings into their breweries, for unloading deals. The Railway Commission held that 4½d. per ton was sufficient; and if the allowance was not reduced to that sum, they would make an order to reduce Plaintiff's rate to Burton station 4½d., to adjust the undue preference.

In *Evershed* v. *London and North Western* (1877) Plaintiff (a Burton brewer) had no siding into his brewery like some other Burton brewers. He paid the Company 1s. per ton cartage to station. Three Burton brewers had sidings from the Midland Railway, and were allowed 1s. per ton for cartage and 9d per ton loading or unloading. The London and North Western Company, who had no siding into these three firms' breweries, allowed them 9d. per ton and gave free cartage, equal to 1s. per ton, to get a share of their traffic. Plaintiff contended this was undue preference towards him. This was held, in the House of Lords, to be undue preference, and Lord Bramwell said—"I

do not care whether the 1s. per ton is part of the toll or not; there is an inequality, which is what the Legislature intended to prevent."

In *Howard* v. *Midland* (1878) Plaintiff had a siding connected with the Bedford Station, and the only terminal service performed by the Company was to put the waggons into and take them from the siding. The rates were purely mileage rates, but Plaintiff claimed an allowance off on the plea that more terminal service was performed on other traffic at the same rates than upon his traffic. The Railway Commission held that the haulage done by the Company's shunting engine was a set-off to the trader not taking up any siding room of the Company while unloading the waggons.

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326. *Thompson and others* v. *London and North Western Railway Company.*—Action in respect of undue preference. The Midland Railway Company at Burton have sidings into Messrs. Truman & Co.'s and Messrs. Cooper & Co.'s breweries, and consequently their rates are station to station, and an allowance of 9d. per ton is given as a drawback for the loading of their ale traffic. The London and North Western Company, who have no siding, with a view to get some of the traffic of these two firms, and to afford equal terms with the Midland Railway, cart between the Burton railway station and these firms' breweries free. The Burton cartage is 1s. per ton, so that, with the 9d. per ton, the London and North Western Company give these two firms an advantage to the extent of 1s. 9d. per ton on their ale traffic. This, the Plaintiff contends, is undue preference, and appeals to the Railway Commission for an injunction to stop the London and North Western Company from making this allowance. The Commission grant an injunction, which is Judgment against the Company.—*Tried in Railway Commission Court, March* 10 *and February* 23 *and* 24, 1875.—*Law Times Reports, vol.* 33, *page* 32.

327. *Bell* v. *The Midland and the London and North Western Railway Companies.*—Action in respect of undue preference. Plaintiff, Bell, of the firm of Peeks & Sons,

Burton-on-Trent, timber merchants, complained that the Company make an allowance to the brewers of 4½d. per ton for locomotive haulage, and 9d. per ton for unloading deals and staves. The Company have sidings into certain breweries, and the brewers have locomotives which haul the trucks from Burton Station into the breweries, and thus save the Company performing unloading and delivery. The following Judgment of the Railway Commission was delivered:—"If 4½d. per ton is allowed for simply unloading, it seems to us too much. The locomotive expenses of a goods train do not average 1s. a mile with a full load, and could not amount to as much as 4½d. per ton upon branches not exceeding one mile in length, even with such causes of increased cost as working in and out of sidings and drawing light loads over short distances. But it does not seem to us too much, nor yet too little, if it represents, in addition, the value to the Companies of being able to discharge their loaded trucks outside their station and in the goods yards of other persons; and, so considered, this rebate is no prejudice to anyone, and is part of a traffic arrangement of general convenience and economy. Now, as to the 9d. per ton unloading, Complainant contends that staves and deals can be unloaded at 2d. per ton. We think the sum it would cost the Railway Company to unload the deals and staves would be 4½d. per ton; and we shall therefore make an order that if the Companies continue to allow 9d. per ton to the brewers, the rates at which staves and deals are carried for the Complainant must be reduced 4½d. per ton; and he shall be paid the costs of this application."—*Tried in Court of Railway Commission, June 7 and 20, 1875.—From Law Times Reports, vol. 33, page 539.*

328. *Eversheд* v. *London and North Western Railway Company.*—Action for £1,356 8s. 7d., rebate of 1s. 9d. per ton cartage on ale at Burton during a period of six years. Plaintiff, a Burton brewer, having no railway siding into his brewery, had all his ale carted to the station by the Company at a charge of 1s. per ton. Messrs. Truman, Hanbury, & Co., Messrs. Ind, Coope, & Co., and Messrs. Cooper & Co. have sidings connecting their breweries with the Midland Railway Company. The

Midland Railway Company's waggons go into these breweries, and the brewers load and unload the railway waggons, and the Midland Company for this service allow 1s. per ton cartage allowance and 9d. per ton porterage for loading. Defendants (London and North Western Company), finding their traffic prejudiced by such allowance, arranged to cart gratuitously the traffic of these three before-named firms, and to allow them 9d. per ton porterage. During the same time Defendants charged Plaintiff for his ale 1s. per ton cartage, and did not give him the 9d. per ton porterage drawback. Plaintiff contended that this treatment amounted to undue preference, and that the overpaid money was recoverable at common law under section 90 (the equality clause) of the Railway Clauses Act, 1845 (8 Vic., cap. 20), and section 2 of the Railway and Canal Act, 1854 (17 & 18 Vic., cap. 31); that a continuous protest against charges of this kind is unnecessary—*Edwards* v. *Great Western Railway Company* (11 C.B., 588).

Justice Lush, in giving Judgment, said—"We think that a railway company cannot, for the sake of increasing their traffic, reduce their rates in favour of individual customers, unless, at all events, there is a sufficient consideration for such reduction which shall lessen the cost to the company of the conveyance of their traffic, or some other equivalent or other services are rendered to them by such individuals in relation to such traffic. We agree with the Judgment of the Railway Commissioners, and the reasoning upon which it is founded, in the case of *Thompson* v. *London and North Western Railway Company* (2 Nev. & Mac., 115). That the action for money had and received will lie, is settled by the highest authority—*Great Western* v. *Sutton* (4 House of Lords Reports, 226)." Judgment against Company, except for payments between September, 1874, and January, 1875, which were taken to be voluntary payments.—*Tried in the Court of Queen's Bench.*

The Company appealed against this Judgment to the Court of Appeal, when Lord Justice Bramwell, in giving Judgment, said—"I am of opinion that this decision ought to be affirmed, and that the case is within the equality clause of the Railway Clauses Act, 1845, because a different toll was charged to the Plaintiff from that charged to the other brewers. It is said

that, if this cartage and loading and unloading is part of the Railway Company's business as carriers, the charge for it is a toll; and it is said that, if the charge is not a toll, the Company must be acting *ultra vires*. I think myself that the doctrine of *ultra vires*, as laid down and acted on in the *East Anglian Railway Company* v. *Eastern Counties Company* (21 L.J., 23 C.P.) and other cases, is founded on a mistake, and that one should read the private Act of a railway company as if it were a deed of settlement, and that the directors doing anything else beyond what they were authorised by the Act would be guilty of a breach of trust. As to the 9d., it is manifest that it is a deduction from the toll; they give them 9d. As to the charge of 1s., a portion of what is charged under the toll is to be attributed to cartage, and therefore the Company charge the other firms less for tolls than they charge the Plaintiff. This is enough of itself to decide the case, but my opinion is also in favour of the Plaintiff on the Traffic Act, 1854 (17 & 18 Vic., cap. 31, sec. 2). The Plaintiff has a right to complain, because an advantage of 1s. 9d. per ton is given to the other firms which is denied to him. I think, therefore, that there is an undue advantage given to the favoured brewers, and there is an undue and unreasonable prejudice and disadvantage to which the Plaintiff is subjected. If the case rests on the Railway Clauses Act, the Plaintiff pays too much for tolls, and he can get it back as money received to his use; and if it is looked upon as a tort, it will be the same figure. Lord Justice Brett and Lord Justice Cotton concurred. Judgment affirmed for Plaintiff, and against the Company.—*Tried at the Court of Appeal, Westminster, Nov.* 28 *and* 29, 1877.—*From Law Times Reports, vol.* 37, *page* 623.

The Company appealed to the House of Lords, when the Lord Chancellor (Cairns) confirmed the Judgment of the Courts below. He said—"In my opinion, undoubtedly the Company is performing identically the same services for the Plaintiff in this action as for the two other firms of brewers whose names have been referred to. Now, as a matter of policy and expediency, it may well be that they have good reasons for treating those other firms in the way they do; but with those considerations the Plaintiff in this action has nothing whatever to do.

Lord Justice Brett said—"The Company may receive the goods at the edge of the railway, or they may receive elsewhere, but still they have to receive the goods in all cases in which they carry. During the whole time while they have the goods in their possession for conveyance they are carriers, and they charge as such. Sometimes they do not receive the goods at the edge of the railway, but they receive them at receiving-houses, or, as in the case here, at the different places of business of their customers."

Lord Blackburn concurred, and remarked "it had been pleaded that the word 'tolls,' in the interpretation clause, is confined to a charge authorised by the Act for carrying goods on the railway, and that the 1s. which has been paid for the cartage outside is not a 'toll' within the meaning of the Act. I think it is quite clear that, when the charge from station to station and a shilling are both paid together by one person for the whole service performed by the Railway Company, including the cartage, and to another person the same tolls are charged and a shilling's worth of cartage is thrown in gratis and not charged for, this latter person gets his goods carried upon the railway at a cheaper rate. I do not care whether the 1s. is part of the toll or not; there is an inequality, which is what the Legislature intended to prevent."—*Tried in the House of Lords, July* 15, 1878.—*Law Times Reports, vol.* 39, *page* 306; *Law Journal Reports, vol.* 48, *page* 22.

329. *Howard* v. *Midland Railway Company.*—Action in respect to a claim for terminal allowance by a trader having a siding into his own yard. Messrs. J. & T. Howard, of Bedford, manufacturers of agricultural implements, having premises connected by private sidings with the Bedford station of the Company, loaded their own goods, and placed the waggons, duly loaded and labelled, in sidings belonging to the Railway Company. The only work of a terminal station which the Railway Company had to perform before such waggons left their goods station was that of arranging them in proper train order. In the case of goods consigned to such trader the unloading took place on his own premises, and therefore the waggons had to be hauled across from the Railway Company's goods station,

and part of the haulage was done by the Company's shunting engine, one hour per day, representing a cost of 8s., being the average time the engine was kept at that work. They charged the firm the uniform mileage rate, and made no charge for anything beyond mileage. Upon complaint by the firm that the Railway Company did not charge him a lesser rate than the other traders of the same place, in consideration of his using his own premises instead of the goods station of the Company,

Held—That he was not entitled to any allowance in respect of his traffic which dispenses with part of what the Company undertook to do for uniform mileage rates for all traffic alike, and that the haulage done by the Company's shunting engine might fairly be regarded as a set-off to the trader not taking up any siding room of the Railway Company while unloading the waggons. Judgment for Company.—*Tried in the Court of Railway Commission, May* 6, 7, 8, *and June* 1, 1878.—*From the Solicitors' Journal and Reporter, vol.* 22, *page* 767.

CARRIERS' LIEN ON GOODS FOR A GENERAL BALANCE.

GENERAL.

	Case No.		Case No.
Sweet v. *Pym* (1800)	104	*Mulliner* v. *Florence* (1878) ...	330
Prenty v. *Midland* (1866)	721		

DIGEST.

In *Sweet* v. *Pym* (1800) a "fuller" (Pym) in Exeter had received cloth from Gard, London, to be "fulled." Pym shipped the cloth back to London, and, hearing Gard had become a bankrupt, Pym overtook the ship at Deal, and got the captain to sign a bill of lading consigning the cloth to him (Pym) in London. Pym thus obtained possession of the cloth, and sold it for a general balance due him by Gard. Lord Kenyon said—"The right of lien has never been carried further than while the goods continue in the possession of the party claiming it. Here the goods were shipped by the order and on account of the bankrupt, and he was to pay the expense of the carriage to London. The custody was therefore changed by the delivery to the captain." Judgment for Sweet, assignee to Gard.

In *Prenty* v. *Midland* (1866) three pigs over the allowed number were loaded as half a waggon; the Company claimed the undercharge, which being refused, the whole consignment of 44 pigs were detained. Baron Pigott held that the Company were not warranted in detaining the 44 pigs, and declined to express an opinion as to whether the Company might have had a lien upon the three pigs.

In *Mulliner* v. *Florence* (1878) a swindler stopped at an inn, and owed £109. He left a pair of horses, waggonette,

and harness behind him, which he had obtained on credit, and for which he had never paid. The innkeeper sold the horses for £73, and kept the money. Plaintiff, who had sold the horses to the swindler, sued for the horses, waggonette, and harness. Lord Justice Bramwell, on appeal, held that Plaintiff could recover the £73, but not the waggonette and harness. "The very notion of a lien is that if the person who is entitled to the lien for his own benefit parts with the chattel over which he claims to exercise it, he is guilty of a tortious act. The lien is the right of the creditor to retain the goods until the debt is paid. It is quite clear the Defendant could not use the horses, yet it is suggested that he could sell them and confer a title upon another person."

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330. *Mulliner* v. *Florence.*—Action in respect to lien. A swindler named Bennett stopped at an inn in Coventry until he owed the innkeeper £109 for lodgings, food, and entertainment. Bennett obtained from Plaintiff a pair of horses, waggonette, and harness, which came to the inn as part of the property of Bennett. Ultimately Bennett was convicted of fraud, and sentenced to penal servitude. Bennett bought the horses and waggonette from the Plaintiff upon the terms that, if they should not be paid for, they should be returned to him free of expenses. After Bennett's conviction, Plaintiff demanded from the innkeeper the horses, waggonette, and harness, and tendered him a sum of £20 for the keep of the horses, but the innkeeper refused to give them up. The innkeeper sold the horses by auction for £73, but he kept possession of the waggonette and harness. On the first trial, the Judge directed Judgment to be entered for Defendant, the innkeeper.

On the appeal case Lord Justice Bramwell said—"The Defendant, who had only a lien on the horses, was not justified in selling them, and he has therefore been guilty of a conversion, and that enables the Plaintiff to maintain this action for the proceeds of the sale. The very notion of a lien is that if the person who is entitled to the lien for his own benefit parts

with the chattel over which he claims to exercise it, he is guilty of a tortious act. He must not dispose of the chattel so as to give someone else a right of possession as against himself. The lien is the right of the creditor to retain the goods until the debt is paid. It is quite clear that the Defendant could not use the horses, yet it is suggested that he can sell them and confer a title upon another person." Thus it was held that the innkeeper had a lien on the carriage and harness, and that the Plaintiff could not recover as to them, but he was entitled to recover the sum of £73, the amount that was realised by the sale of the horses by auction.—*Tried in the Court of Queen's Bench Division, January* 28, 1878.—*From Law Reports, Queen's Bench Division, vol.* 3, *page* 484.

RAILWAY COMPANIES HAVE NOT A GENERAL LIEN UNDER THE RAILWAY CLAUSES ACT FOR AN UNPAID GENERAL BALANCE, ALTHOUGH THEY CAN HAVE SUCH LIEN BY SPECIAL CONTRACT.

	Case No.		Case No.
North v. *L. & S. W.* (1863) ...	331	*Caledonian* v. *Guild* (1873... ...	333
Wallis v. *L. & S. W.* (1870) ...	332	*Highland* v. *Jackson* (1876) ...	334

DIGEST.

In *North* v. *London and South Western* (1863) the Company seized some coal in liquidation of a general balance. Chief Justice Erle held that the seizure had been wrongly made in the name of the Company instead of the person named in the notice of tolls, and prior to the seizure no proper demand and refusal of payment had taken place, as required by the Act under which the seizure was made.

In *Wallis* v. *London and South Western* (January, 1870) the Company detained goods for a general balance, claiming to do so under 97th section of Railway Clauses, 8 & 9 Vic., cap. 20. Chief Baron Kelly held that "tolls" referred to in this section did not mean carriage, and the Company could not exercise a general lien for carriage upon the authority of that

section. In a subsequent trial, before Chief Justice Cockburn, at the Kingston Assizes, on another issue, the Company succeeded on the plea of their general conditions notice, the Chief Justice saying—"If there was no dissent on Plaintiff's part, the previous usage and assent implied that the Company would be entitled to retain the goods on such lien."

In *Caledonian Railway* v. *Guild* (1873) the Company detained seven large oil tanks that had been fixed upon railway waggons for a shale company's traffic. The shale company were sequestrated, and Guild was the trustee, and resisted the Railway claim to the tanks for a general balance. The Lord Ordinary held that the Company had a full lien under the 90th section of the Clauses Act (Scotland), and disagreed with the decision in *Wallis* v. *London and South Western* in the restriction of the word "tolls."

In *Highland Railway* v. *Jackson* (1876) the Company detained goods for a general balance, claiming authority under 90th section of Railway Clauses Act to detain for "tolls." The Lord President of the Court of Session, following the case of *Wallis* v. *London and South Western*, held the Company had no power under that section to detain goods for the carriage, such carriage not being "tolls" within the meaning of the section.

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331. *North* v. *London and South Western Railway Company.*—Action for £299 2s. 1d., amount realised by the sale of a quantity of coal seized and sold by the Company in liquidation of a ledger account of £494 7s. 7d. due them, and for which Plaintiff had given a promissory note. The note was due on August 6, 1859, and was drawn on June 3, 1859. Plaintiff was the assignee of A. & C. Prior, who were adjudicated bankrupts 24th August, 1859. The Company claimed the power to seize and sell under the 4 & 5 Will. IV., cap. lxxxviii., sec. 166, their own Act. Chief Justice Erle held that the assignee in bankruptcy of A. & C. Prior was entitled to recover the value of the coal seized, as the seizure was not authorised by the

statute, inasmuch as it was made by the Company, and not by the person named in the notice of tolls as the person to whom they were to be paid, and as, notwithstanding the presentment and dishonour of the notice, there had not been prior to the seizure any such demand and refusal of payment as the Act required. Verdict against the Company.—*Tried in the Court of Common Pleas, April* 22, 1863.—*From Law Journal Reports, vol.* 32, *page* 156. (In the present state of the law it is wise to grant only monthly accounts on a special agreement containing all the requisite power as to seizures and sale of goods.)

332. *Wallis* v. *London and South Western Railway Company.*—Action for non-delivery of goods held as a lien under 97th section of Railway Clauses Act, 1845 (8 and 9 Vic., cap. 20), carried London to Jersey. Plaintiff owed the Company for previous goods, tolls £1, and carriage £1, which he refused to pay, and hence the detention of the goods. Chief Baron Kelly held that "it is quite clear, on looking to the terms of the section, that it does not apply to the price for the carriage of goods, but it only applies to the case of goods which have been conveyed in a carriage or carriages of the owner upon the Defendants' railway, where all the Company are entitled to is to be paid for the use of the railway for that purpose. This is clear from the 95th and 96th sections, providing that tolls are only payable where a board is exhibited and mile-stones set up. No doubt the word 'toll,' especially under the interpretation clause, may have a more extensive signification, but the question is its meaning in the 97th section. It is clear that the section on which the plea is founded does not apply to the facts stated in this plea. The plea forms no defence to the action, and Plaintiff is entitled to our Judgment." Baron Martin agreed. Baron Channell agreed in the Judgment, but said—"*If a carrier conveys goods under a particular notice, that notice and the acceptance of it may constitute a special contract, which will give him a general lien.* The plea of the Company, so far as it depends upon the statute, is to set up a kind of statutory general lien, that is, not a lien in respect of particular goods, but a lien more extensive, namely, in respect of all

goods entrusted to the Defendants." Baron Pigott also agreed that the case was not within the statute. Verdict for Plaintiff.—*Tried in Exchequer Court, January* 17, 1870.—39 *Law Journal* (*New Series*), *Exchequer, page* 57.

332½. *Wallis* v. *London and South Western Railway Company.*—The same Plaintiff in last case brought an action against the same Company, which was tried before Chief Justice Cockburn, April 3, at Kingston, Surrey. Plaintiff now sued for the value of goods, as having been detained until they were of no use to him, and as to two of the parcels he said he had tendered the charges thereon. His profit on the loss of sale was about £5. One of the Company's carmen, who delivered one parcel, swore he had received instructions from the Company's agent that if the Plaintiff offered to pay the charges thereon it was to be left; but that the Plaintiff, on looking at the bill which contained the charges on the previous consignments, refused to receive it, and said "Take it back." Witness admitted he did not tell Plaintiff this. The Plaintiff, it seemed, had had a ledger account with the Company, which seems to have been stopped (the report does not state why), and payment was required on delivery of each lot. Probably the stoppage of the credit led to the dispute. The Plaintiff was a toy-seller in Jersey, and the parcels contained goods usually sold by toy-sellers.

The Company contended they had a general lien upon goods, according to their notices at back of their consignment and delivery notes, viz.—

"The goods are delivered on the terms that they are to be considered subject to a lien, not only for any sums due thereon, but also for all previous unsatisfied charges due to the Company from the same party."

The Judge said it was a most discreditable case to be brought to the Assizes. The whole sum in dispute was about £5, and there was no necessity to refuse payment and sue for recovery of the value of the goods. It would be impossible to recover the full value. The Plaintiff should have paid the charges demanded under protest, and then sued to recover the excess. Otherwise the most monstrous consequences would follow if, on account of some excess of a few shillings, large amounts could be recovered for the full value of the goods. The

question was as to a general lien, which the Company as carriers would not have at common law, but which they claimed on the ground of special contract printed on their tickets. No doubt there must be some assent to these terms by Plaintiff, but that assent need not be express, and might be implied from conduct. Could the Jury doubt that the Plaintiff had, by the course of dealing on these tickets, assented to the terms they contained? So long as the accounts were paid no occasion could arise (to exercise the lien), and it was only in such a case the stipulation for a general lien applied. When it arose the lien was at once asserted. It did not appear that when the goods in question were tendered to him with the bill containing the previous charges, he tendered the charges on the particular goods brought to him; on the contrary, it appeared that he repudiated and refused to receive them. If there was no dissent on Plaintiff's part, the previous usage and assent applied, and the Company would be entitled to retain the goods on such a lien. The Jury gave a verdict for the Company.—*Tried at the Kingston Assizes, before Chief Justice Cockburn, April* 3, 1870.—*The London Times, April* 4, 1870.

333. *Caledonian Railway Company* v. *Wylie Guild.*—Action for £703 14s. 8d., amount of a ledger account due to the Railway Company from the East Hermand Shale Company for carriage. The Shale Company were sequestrated, and Defendant (Wylie Guild) appointed trustee. The Shale Company had seven large tanks that had been fixed on railway waggons for carriage of oil. These tanks, valued at £280, or £40 each, the Railway Company detained for the carriage due. The Railway Company's debt consisted of—(1) Tolls for the use of the tank waggons, station to station; (2) charges for the supply of engine power and other expenses in conveying the waggons along the railway; (3) rates for the carriage of other goods along the railway, including therein tolls for the use of the railway. The amount of tolls for the mere use of the railway far exceeded £280. The Railway Company based their lien upon the tanks upon the 90th section, Railway Clauses Consolidation Act of Scotland, which is the same as the 97th section of the English Act. The principal plea of the

Defendant was that the accounts claimed by the Railway Company being for charges incurred to them as common carriers, or at anyrate not being for tolls, the statutory rights claimed by them are inapplicable.

The Judge (Lord Ordinary) held that the Company had a full lien under the 90th section of the Act quoted. He disagreed with the decision of *Wallis* v. *London and South Western Railway*, where the word "tolls" was restricted to a charge for carriages or goods using the line, and did not include the carrier's hire for carriage. He gave a verdict for the Railway Company, decreeing that they might retain the seven tanks for the value (£280), and ordering that they should rank as ordinary creditors for the difference due from the estate. Seeing that a sum equal to the value of the tanks could have been proved to have been due for "tolls" in the restricted sense of the word, the Railway Company in *this* case would probably have recovered, as the decision in the case of *Wallis* v. *London and South Western* would not have been at variance, but rather in support.—*Tried before the Lord Ordinary, Edinburgh, November* 26, 1873.—*From Scottish Reporter of* 1873.

334.—*The Highland Railway Company* v. *Jackson (Nicol & Co.'s Trustee).*—Action on the part of the Highland Railway Company to detain and sell three bags wool, one truss of tweed cloth, and three bundles of empty sheets, for a ledger account debt of £26 17s. 1d. Nicol & Co., manufacturers, were sequestrated, and their trustee contested the seizure of the goods on the Company's premises in liquidation of the ledger account debt. The Sheriff Substitute sanctioned the sale of the goods under the 90th section of the Railway Clauses Consolidation Act (Scotland). On appeal to the Sheriff, he altered the Judgment. The Railway Company then appealed to the First Division of the Court of Session, when the Lord President gave Judgment, saying—"The interpretation clause of the Railway Clauses Act provides that 'toll' is to be held to include 'any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods or merchandise, articles, matters or things conveyed on the railway.' This is very comprehensive, and would,

in my opinion, embrace both tolls in the proper sense of the word and also charges for carriage. In section 79 the meaning of the word 'tolls' is really charges for the carriage of passengers and goods; while in section 80 it is quite clear that it is used in the other sense, and means tolls proper only—that is, tolls for the use of the railway by the carriages of other people. In sections 83 and 84 the word includes both tolls proper and charges for carriage. It is clear that section 88 is confined to tolls in the proper sense of the word for the use of the railway by carriages. I do not think there can be any doubt that in the 89th section the word is used in the same sense as in the 88th section, because a payment for the carriage of goods is not a kind of thing that is to be 'paid to such persons and at such places upon or near the railway as the Company may appoint.' The carriage of goods is paid upon their delivery. The remedy given in the 90th section is a very intelligible and suitable remedy for an attempted evasion of the tolls. If persons passing along a road contrive to get off the road before the toll is paid, and so evade the toll collector, the necessity for some summary remedy at once suggests itself. They ought to have paid the toll at the proper place appointed for its payment, and to the person placed there in charge to receive it; and we are reminded, not inappropriately, that there are remedies of the same kind for evading tolls on turnpike roads. It seems to me that the whole language of the 90th section is in harmony with that idea, and that none of the words used in that section can be applied or naturally applied to the lien for the carriage of goods by the Railway Company acting as common carriers. The construction the Railway Company put upon this 90th section is that 'tolls' here means not only tolls for the use of the railway by the carriages of other persons, but also charges for carriage, the result of which is that the section, according to their construction, is an extension of the common law lien of common carriers to goods other than those for which the charges are due—in fact, a lien for a general balance of account. There is, I think, no direct authority upon this question in Scotland; but there is a case, *Wallis* v. *London and South Western*, decided in the Court of Exchequer in England, which is a direct

authority in support of the view I have just expressed. The 97th section of the English Act corresponds to 90th section of the Scotch Act, and in the case of Wallis there was a unanimous Judgment affirming the more limited construction of the word 'tolls' in the 90th section, which I think is the due construction." Lords Deas, Ardmillan, and Mure concurred. Verdict accordingly against the Company.—*Tried in the First Division of the Court of Session, Scotland, June* 16, 1876.—*From Scottish Law Reporter of June* 14, 1876.

DURING THE PERIOD OF EXERCISING THE LIEN BY DETAINING THE GOODS, NO CHARGE CAN BE MADE FOR THE KEEPING, *i.e.*, WAREHOUSE RENT.

Case No.

British Empire Shipping Company v. *Somes* (1858) 335

DIGEST.

In *British Empire Shipping Company* v. *Somes* (1858) the Defendants repaired a ship belonging to Plaintiffs, which was placed in a graving dock for the purpose. When the ship was repaired, Plaintiffs did not pay the cost and remove her, and liberate the graving dock. Defendants detained the ship as a lien for the repairs, and charged £21 per day for the occupation of the dock. Held, the Exchequer Chamber affirming the Judgment of the Queen's Bench—That the shipwrights had no lien for the use of the dock during the detention.

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335. *British Empire Shipping Company* v. *Somes.*—Action in respect to lien. Shipwrights contracted with the owners of a ship to do repairs on the ship in the shipwrights' graving dock. In the contract a provision was made that a lump sum should be paid for the use of the dock, the other charges being on a *quantum meruit*. The ship was repaired in the dock, and the owners were not prepared to pay the price. The shipwrights gave notice that they would detain the ship and claim £21 a day for the use of the dock during the deten-

tion. The shipowners paid, under protest, the whole amount claimed, and brought this action to recover back the dock rent, £567.

Held, the Exchequer Chamber affirming the Judgment of the Queen's Bench—That the shipwrights had no lien for the use of the dock during the detention.

Chief Justice Lord Campbell said—"The right of detaining goods on which there is a lien is a remedy for the party aggrieved which has to be enforced by his own act; and where such a remedy is permitted, the common law does not seem generally to give him the costs of enforcing it." This case is quoted as deciding that the carrier is not entitled to make any charge for warehousing of goods during such time as he may be retaining them as a lien for his carriage.—*Tried in the Court of Exchequer Chamber, May* 26, 1858.—*From Ellis, Blackburn, and Ellis's Reports, page* 353.

CARRIER MUST MAKE A FORMAL DEMAND FOR CARRIAGE OR TOLLS BEFORE BEING LEGALLY WARRANTED IN SELLING GOODS TO SATISFY THE LIEN.

	Case No.		Case No.
Field v. *N. A. & H.* (1858) ...	365	*Pendreigh* v. *N. B.* (1870)	336
North v. *L. & S. W.* (1863) ...	331		

DIGEST.

In *Field* v. *Newport A. & H.* (1858) the Company detained and sold Plaintiff's waggons for an account unpaid. The account was made up of tolls and back carriage on empty waggons. The dispute arose from the Company increasing the rates, which Plaintiff would not pay. Baron Bramwell held that under the Railway Clauses Act the Company were not empowered to distrain except upon demand for payment and refusal; that a demand for a certain sum made up of two sums claimed on two distinct grounds is not a demand of either. It appeared the demand for the tolls on the full waggons should have been made as a distinct demand, separate from the demand for the back carriage on the empty waggons.

In *North* v. *London and South Western* (1863) the Company seized a quantity of coal, and sold it for a general balance under 4 & 5 Will. IV., cap. 88, sec. 166. Chief Justice Erle held Plaintiff was entitled to recover, as the seizure of the coal was not authorised by the statute, inasmuch as it was made by the Company, and not by the person named in the notice of tolls as the person to whom they were to be paid.

In *Pendreigh* v. *North British* (1870) the Company had sold a quantity of grain for a general balance under the Railway Clauses Act (before the decision of *Wallis* v. *London and South Western*). Plaintiff had become bankrupt, and his trustee consented to the sale, and the proceeds to be lodged in Court. Plaintiff now contended *no demand for payment and refusal* had taken place, as required by the Act. On appeal, the Lord President held that, as the trustee had consented to the sale, "it is not now possible for him to say that the sale was unwarrantable and illegal."

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336. *J. & G. Pendreigh's Trustee* v. *North British Railway Company.*—Action by trustee of a firm who had stopped payment for a quantity of grain detained and sold by the Company for a debt of £852. When the firm of J. & G. Pendreigh, corn merchants and brewers, stopped payment, the Company stopped certain grain in their possession, and obtained a warrant from the Sheriff, under *90th section of Railway Clauses Consolidation Act (Scotland)*, 1845, to sell same in payment of their account, to which the trustee consented, the money, £397 7s. 10d., to be lodged in Court.

The trustee pleaded that the Company were not entitled to the proceeds of the sale, and that such should form part of the assets, as *no demand had been made*, in the sense of the railway statute, for payment of the Company's account; and that the petition presented to the Sheriff Substitute was incompetent and unnecessary. The Company contended that a formal demand had been made for payment, but, assuming such had not been done, *the petition itself* was a sufficient demand under the Act above referred to. The Act runs—"If on demand any

person fail to pay tolls due in respect of carriage." The Sheriff held that the service of said petition on the trustee foresaid was sufficient demand for payment of tolls due in respect of said goods under section 90 of the Railway Clauses Act. Finds, therefore, that the petition and sale following thereon are valid procedure under said enactment for recovery of the tolls claimed by the petitioners for carriage aforesaid.

The trustee appealed to the Sheriff, who finds that no demand within the meaning of the special statute had been made, and orders the clerk to pay the trustee £397 7s. 10d., proceeds of sale. "In the absence of a sufficient demand for payment, were the Company entitled, at the date of the application to Sheriff Substitute, to get the warrant to sell—in other words, were they then entitled to sell if they had not asked a warrant? The warrant was granted, of *consent* and under reservation of all rights and pleas of parties. Before the warrant was applied for, and as the condition of getting it, a demand for payment was necessary." There were two firms of J. & G. Pendreigh —one firm grain merchants, and the other brewers—having different places of business, and the trustee complained that it was not specified by the Company what proportion of the money claimed pertained to each firm. On the other hand, the report does not specify whether the grain sold belonged to the one or the other firm. The Company appealed to the Court of Session against the Sheriff's verdict.

The Lord President said the special statute introduced two novelties at variance with common law—(1) A right of retention for charges on other goods; (2) a power to sell the goods so retained if payment is not made after demand. "It is not provided *how* the demand shall be made. If the Company sold without a judicial proceeding, and made no demand, the sale would be null, and the proceeds belong to the debtor. The Company presented a petition to the Sheriff, and asked service on the Respondent as trustee on *both estates*, and it was contended that was equivalent to a demand. It might be said if the service was not a demand within the statute it might reasonably be held that the parties had dealt with it before the Court as such, and could not now *resile* and say it was a bad demand. That defence should have been made before the

Sheriff. If the plea that no demand had been then stated, and if the trustee consented to the sale, it is not now possible for him to say that the sale was unwarrantable and illegal. It must be held that the trustee had waived his objection." Lords Ardmillan and Kinloch concurred. Lord Deas dissented, and considered the Company had no right to bring the trustee into Court on the footing that service of the petition was a sufficient demand for payment. He was also of opinion that the plea of "no proper demand" had not been waived, but was reserved. Verdict for Company.—*Tried in Court of Session, Edinburgh, July* 15, 1870.—*From English Clearing House Reports, No.* 231, *page* 291.

IN RESPECT TO THE CARRIER'S LIEN FOR GENERAL BALANCE BEING SUPERSEDED BY SENDER'S RIGHT OF STOPPAGE IN TRANSITU.

Case No.
Oppenheim v. *Russell* (1802) 337

DIGEST.

In *Oppenheim* v. *Russell* (1802) the consignee of the goods failed before the goods were delivered, and the carrier held the goods for a general balance due by consignee in the face of the sender issuing a notice of stoppage *in transitu*. Chief Justice Lord Alvanley held that the carrier could not, for a general balance, hold the goods against the sender's stoppage *in transitu*.

337.—*Oppenheim* v. *Russell*.—Action against a carrier for detaining goods for a general balance of £4 7s. due by consignee. The consignee, before delivery of the goods, which were carried from London to Plymouth, failed, and sender gave notice to the carrier of stoppage *in transitu*. The carrier declined to deliver up the goods to the sender, but held them for the £4 7s. general balance and £1 7s. 2d. carriage on the particular goods in question. The carrier in 1801 gave public notice, by circulating hand-bills and advertisements in *London Gazette* and other newspapers, that all goods which should be delivered for the purpose of being carried would be considered as general liens, and subject not only to the money due for the

carriage of such particular goods, but also to the general balance due from the respective owners to the carrier. One of these hand-bills had been delivered to consignees (Negretti & Co.) at their shop in February last. The carrier quoted the cases of *Aspinall* v. *Pickford* (3 Bosanquet and Puller, 44) and *Naylor* v. *Mangles* (1 Esp., 109.)

Chief Justice Lord Alvanley said—"I confess I thought the proposition a monstrous one when first started, and I still think it impossible to maintain that an agreement between the consignees of goods and the carriers upon the Western Road can put an end to the right of stopping *in transitu* vested in the senders of goods before that agreement existed. It was admitted that if the consignee had made an assignment of the goods, his assignee could not have defeated the rights of the senders. Then, if he could not do it by assignment, how can he by any agreement with the carrier, for the carrier comes in under the consignee? I am of opinion that the evidence offered was not admissible for the purpose for which it was offered." Judgment against carrier.—*Tried in Court of Common Pleas, February* 10, 1802.—*From Bosanquet and Puller's Reports, vol.* 3, *page* 42.

Railway Companies' Lien on Goods for a General Balance by virtue of Notice or Usage.

Case No.
Wallis v. *London and South Western* (1870) 332

DIGEST.

In *Wallis* v. *London and South Western* (April, 1870), after the trial in the Court of Exchequer, a second trial took place before Chief Justice Cockburn, at the Kingston Assizes, probably on a new transaction. The Company there claimed their right of lien on goods for a general balance by virtue of their public notices at back of their consignment and delivery notes. Chief Justice Cockburn said—"If there was no dissent on Plaintiff's part, the previous usage and assent implied the Company would be entitled to retain the goods on such lien."

Warehousemen's and Wharfingers' Lien on Goods for a General Balance.

	Case No.		Case No.
Naylor v. *Mangles* (1794)... ...	263	*Crawshay* v. *Homfray* (1820) ...	338
Spears v. *Hartley* (1799)	264	*Holderness* v. *Collinson* (1827) ...	339
Richardson v. *Goss* (1802) ...	110	*Leuckhart* v. *Cooper* (1836) ...	340

DIGEST.

In *Naylor* v. *Mangles* (1794) Plaintiff bought sugar, stored in Defendant's warehouse, from one Boyne. Now Boyne owed Defendant an old balance of account, and Defendant refused to deliver the sugar. Boyne paid the demand, and sued to recover same. Lord Kenyon held that by custom warehousemen had a lien for a general balance. Judgment for warehouseman.

In *Spears* v. *Hartley* (1799) Defendant detained a log of mahogany (warehoused with him) for a general balance owing and unpaid for nine years. Lord Eldon held there was no statute of limitations in respect to a lien, and that the warehouseman may enforce payment by the lien which the law has given him for his general balance.

In *Richardson* v. *Goss* (1802) three hogsheads of hams came from Newcastle to London, and were lodged in Defendant's warehouse, being consigned to Wilson. Now Wilson became bankrupt, and wrote sender (Richardson) he would not take the hams, and thus rescinded the purchase. Goss had no advice of this, and, having an old balance due from Wilson, detained the hams. The Court held the contract of purchase had been rescinded, and Goss could not hold the hams from Richardson (sender), although he might have done so against Wilson by the custom of a warehouseman's lien for an old balance.

In *Crawshay* v. *Homfray* (1820) Tottie & Co. lodged a quantity of iron at Defendant's wharf, and the next day sold it to Crawshay, and Crawshay removed part, leaving 90 tons on hand. This was in

October, and the usage between Tottie and Homfray was that warehouse charges were paid at Christmas. In March Tottie became bankrupt, owing Homfray £126, and Homfray detained the iron. Chief Justice Bayley held in favour of Plaintiff and against warehouseman.

In *Holderness* v. *Collinson* (1827) Foxton, whose assignee was suing, had, before his bankruptcy, deposited goods with Collinson, a wharfinger, and Collinson held the goods for a general balance due. This was at Hull. Justice Bayley held that the warehouseman's lien depended upon the usage of the particular place, and as the wharfinger had not established the usage at Hull, Judgment must be given for the Plaintiff.

In *Leuckhart* v. *Cooper* (1836) Plaintiff, by his agent Heilbron, had warehoused wool with Defendant. Heilbron owed Defendant a large sum as a general balance, and Defendant detained eleven bales of the wool. Chief Justice Tindal held that Heilbron being only a factor, and not the real owner of the wool, the warehouseman had no lien upon it. Judgment for Plaintiff.

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338. *Crawshay* v. *Homfray.*—Action in respect to warehouseman's lien. On the 14th October a quantity of iron was landed at Defendant's (Homfray's) wharf. The next day Tottie & Co. sold the iron to Plaintiff (Crawshay), and part of the iron was removed, leaving 90 tons on hand. It was the usage between Tottie & Co. and Homfray that the charges on goods should be paid at Christmas, so that in October, when Plaintiff purchased the iron, there were no charges due upon it. In March Tottie & Co. became bankrupt, owing Homfray about £126, and Homfray detained the 90 tons of iron for his lien for wharfage, &c.

Chief Justice Bayley, on appeal, said—"According to the usage of trade, it appears that in this case a specific time is given to the merchant importer for the payment of these dues. At the time of sale the Plaintiffs had clearly a right to the delivery without any lien being claimed by the

Defendants. In consequence of this, on their application a great part of the iron is delivered. How, then, can the non-delivery of the remainder till after the debt due from Tottie & Co. has become payable make any difference? As it is clear that at the time of the sale the Defendants had no lien, I am of opinion that the subsequent non-delivery did not give any new right of lien to them." Judgment against the wharfinger.—*Tried in the Court of King's Bench, November* 9, 1820.—*From Barnewall and Alderson's Reports, vol.* 4, *page* 50.

339. *Holderness* v. *Collinson.*—Action for possession of goods retained for balance of account. Defendant (Collinson) is a wharfinger at Hull, owning a wharf and warehouse. Foxton, whose assignees were suing, had before his bankruptcy deposited 17½ tons flax and 20 bales mats in Collinson's warehouse. At the time of the bankruptcy only 9 tons flax and the mats remained. The charges on the entire lot for wharfage and labourage (viz., landing, weighing, and delivery) was £41 10s. 3d. The assignees tendered this sum, but the wharfinger refused it, requiring a further amount of £31 3s. 11d. due on previous goods that had been removed.

Justice Bayley said—"The onus of making out a right of general lien lies upon the wharfinger. There may be an usage in one place varying from that which prevails in another. Where the usage is general, and prevails to such an extent that a party contracting with a wharfinger must be supposed cognisant of it, then he will be bound by the terms of that usage. But then it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself by imposing special terms, and he should give notice to his employer of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right of general lien for anything beyond the mere wharfage. An attempt has been made to draw a distinction between the claim for labourage and that for warehouse rent, but the right to either arises out of an express or implied contract, and the case states that the claim to both these items is a point in dispute at Hull. In the face of such a statement it is impossible to infer that the bankrupt landed his goods at the Defendant's wharf upon the terms of giving a general lien in respect of those demands and waiving

the dispute. Many of the instances of acquiescence have proceeded upon the smallness of the demand and a desire to avoid litigation or to have immediate possession of the goods, and this greatly diminishes the effect of them. For these reasons I think that the Plaintiffs are entitled to recover." Judgment against wharfinger.—*Tried in Court of King's Bench, Trinity Term*, 1827.—*From Barnewall and Cresswell's Reports, vol. 7, page* 212.

340. *Leuckhart* v. *Cooper.*—Action in respect to carrier's lien. The Defendant (Cooper) was a warehouse keeper in London, and had received into his warehouse 200 bales of wool to the order of Edward Heilbron. Upon this wool Cooper, in respect to advances, entering, landing, and housing, had paid £970. All the wool had been delivered except eleven bales, which Cooper detained as a lien for the further sum of £1,030 due to him by Edward Heilbron as a general balance of account. It appeared the wool really belonged to Plaintiff, a foreign merchant, and that Heilbron was only his factor to sell the wool in London.

Chief Justice Tindal said, on the appeal case—"The question is, whether the custom of public warehouse keepers in London having a general lien is a custom which can be supported in law. The custom set up, if supportable, would make the goods of a foreign merchant, consigned to a London factor for sale, and by him put into the warehouse of the warehouse keeper for safe custody, liable to a private debt of the factor for expenses incurred in respect of other goods of third persons which had been in his hands at former times for charges contracted upon such goods during any antecedent period of time, and that to an unlimited extent. It appears to us that such a custom is unreasonable and unjust, and therefore bad in law. No authority has been cited in support of this custom, and, as far as any analogy can be drawn from decided cases, it is against its validity. The case of *Oppenheim* v. *Russell* established the principle that, although a common carrier may have acquired, by usage or special agreement, a lien for the general balance of account between him and a consignee, this lien shall not affect the right of the sender to

stop *in transitu*, *i.e.*, in effect, that this right of general lien shall not operate upon or against the rights of third persons. The case of *Wright* v. *Snell* decides this case, for no sound distinction can be taken, in this respect, between a public warehouse keeper and a public carrier, except, indeed, that the latter stands in a position more favoured by the law in respect to lien than the former, the carrier being obliged by law to receive and carry the goods, whilst the warehouse keeper's claim arises out of a voluntary contract. It is contended in this case that the goods became, by the operation of the custom, *pledged* for the factor's debt, although the factor was not authorised by law so to pledge them directly; and although the factor may now, under some circumstances, pledge, the facts of the case do not bring it within the operation of the statute 6 George IV., cap. 94." Judgment against the warehouse keeper.—*Tried in Court of Common Pleas, June* 13, 1836.—*From Bingham's Reports, vol.* 3, *page* 99.

THE OLD CARRIERS' LIEN ON GOODS FOR THE CARRIAGE ON THOSE PARTICULAR GOODS DID NOT INCLUDE A LIEN FOR A GENERAL BALANCE.

	Case No.		Case No.
Skinner v. *Upshaw* (1702)	341	*Butler* v. *Woolcott* (1805)	344
York v. *Grenaugh* (1703)	342	*Rushforth* v *Hadfield* (1805) ...	345
Aspinall v. *Pickford* (1802) ...	343		

DIGEST.

In *Skinner* v. *Upshaw* (1702) the carrier refused to part with or deliver to consignee the goods consigned to him until he paid the carriage on those particular goods. Chief Justice Holt held that the carrier could retain the goods for his hire.

In *York* v *Grenaugh* (1703) goods had been stolen, and the thief had delivered them to a carrier. The carrier refused to give up the goods to the rightful owner until his hire for conveyance had been paid. Chief Justice Holt held that the carrier could detain the goods for his hire in such a case.

In *Aspinall* v. *Pickford* (1802) the carrier snatched a Judgment authorising him to retain goods to satisfy a general balance, but this favourable decision was soon overruled; and although the carriers of that day on the Western Road tried hard to establish the law in their favour in this respect, they failed in all subsequent cases.

In *Rushforth* v. *Hadfield* (1805) the carrier detained goods for a general balance. Lord Ellenborough said—"The lien claimed by carriers for their general balance is not founded on common law. There was no sufficient evidence on which the Jury could find any such general usage as would warrant the conclusion of an agreement between the parties to adopt it."

In *Butler* v. *Woolcott* (1805) the carrier detained six firkins butter for a general balance due by sender, the sender paying carriage. The sender became bankrupt. It was proved consignee had actually paid sender for the butter. Held—That the butter was the property of consignee on delivery to carrier, and Judgment was therefore against the carrier.

341.—*Skinner* v. *Upshaw.*—Action in respect to carrier's lien. The carrier refused to deliver to consignee his goods because the consignee would not pay him his hire.

Chief Justice Holt held that the carrier may retain the goods for his hire, and upon this direction the Defendant had a verdict given for him. Judgment for carrier.—*Tried at the Guildhall, London, May* 12, 1702.—*From Lord Raymond's Reports, vol.* 2, *page* 752.

342.—*York* v. *Grenaugh.*—Action in respect to carrier's lien. In this case Chief Justice Holt said, citing the case of the Exeter carrier—"Where 'A.' stole goods, and delivered them to the Exeter carrier to be carried to Exeter, the right owner, finding the goods in the possession of a carrier, demanded them of him, upon which the carrier refused to deliver without being paid for the carriage. The owner brought trover, and it was held that he might justify detaining them against the right owner

for the carriage, for when 'A.' brought them to him he was obliged to receive them and carry them, and therefore, since the law compelled him to carry them, it would give him remedy for the premium due for the carriage."—*Tried in the Court of King's Bench, Easter Term*, 1703.—*From Lord Raymond's Reports, vol.* 2, *page* 867.

343. *Aspinall* v. *Pickford.*—Action in respect to a carrier's lien for a general balance. The action in this case was by Aspinall, assignee of Howarth. The defence was that the goods were put by Howarth into the hands of Pickford, as a carrier, to be forwarded from Manchester to his warehouse in London, and that the Defendant was entitled to retain against the estate for the general balance due from Howarth for the carriage of goods. This right was established by evidence of the Defendant having before claimed and being allowed to retain for his general balance, both against bankrupt assets and solvent customers, and also by the evidence of a principal carrier on the Western Road to the same effect respecting himself. Judgment for the carrier.—*Tried before Lord Kenyon at the Guildhall Sittings, Easter Term*, 1802.—*From Bosanquet and Puller's Reports, vol.* 3, *page* 44. (Subsequent decisions overruled this decision.)

344. *Butler* v. *Woolcott.*—Action against carrier for detaining six firkins butter (Sherborne to London by carrier's waggon) for a general balance, £55, due by sender. Sender (Ensor) always paid the carriage of his butter by a running account. In this case, before the six firkins had reached consignee's (Butler's) hand in London, Ensor had become bankrupt, and the carrier (Woolcott) detained the butter. It was proved that consignee had actually paid sender for the butter.

The Court were clearly of opinion that the carrier's claim to retain for the debt of the sender could not be supported as against the consignee, whose property the goods were from the moment of delivery to the carrier. Judgment against carrier. —*Tried in Court of Common Pleas, November* 14, 1805.—*From Bosanquet and Puller's Reports, vol.* 2, *page* 64, *N.R.*

WHERE A GENERAL LIEN IS ESTABLISHED BY AN EXPRESS AGREEMENT, GENERAL USAGE, OR MODE OF DEALING.

	Case No.		Case No.
Rushforth v. *Hadfield* (1805) ...	345	*Kinnear* v. *Midland* (1868) ...	349
Wright v. *Snell* (1822)	346	*Wallis* v. *L. & S. W.* (1870) ...	332
Clarke v. *Midland* (1859)	347	*Wiltshire Iron* v. *G. W.* (1870) ..	350
Northfield Iron Co. v. *Mid.* (1866)	348		

DIGEST.

In *Rushforth* v. *Hadfield* (1805) Lord Ellenborough, while disallowing the carrier's general lien, said—"There have been previous dealing between these parties, and there might have been evidence to show, if such had been really the case, that it was understood between them that the carriers were to have a lien on any parcel of goods in their hands for the carriage price of those which had been antecedently delivered. But that was not resorted to, but it was left to the Jury as a case turning on the general usage of carriers."

In *Wright* v. *Snell* (1822) goods were sent to Robinson, London, and were stopped by carrier for a general balance due him by Robinson. It turned out these goods did not belong to Robinson, and he only acted as an agent. The carrier claimed the general lien on the ground of a general notice. Justice Bayley said—"Now, perhaps, as between the real owner of the goods and the carrier, that (the notice) might be a binding bargain." Robinson not being the real owner, Judgment went against the carrier.

In *Clarke* v. *Midland* (1859) the Company detained two train-loads of coal for a balance of a monthly account, £308. The ledger account was opened on the condition that the Company should have a general lien on all goods. On appeal, it was held that by such express agreement the Company had such lien.

In *Northfield Iron and Steel Company* v. *Midland Railway Company* (1866) the Company had opened a

ledger account on the express agreement that they should have a general lien. The Iron Company became bankrupt, at which time there were no goods on hand. Five days after the Iron Company's petition was lodged, the official liquidator sent goods by the Railway Company for carriage. The Company detained these goods for balance of ledger account. Lord Romilly held the Company could detain them, and said—"It must be implied the liquidator sent the goods under a continuation of the original contract between the parties."

In *Kinnear* v. *Midland Railway Company* (1868) the Company had in their possession a colliery locomotive for repairs. The colliery proprietors becoming bankrupt, the Company detained the locomotive for a general balance, there being an express agreement for a "general lien." The Court held the Company did not hold the engine under a contract *to carry*, but under an agreement to repair, and they could not detain it for their general lien.

In *Wiltshire Iron Company* v. *Great Western Railway Company* (1870) the Railway Company had an express agreement for a "general lien." On the 16th November, 1866, an order in Chancery was made to wind up the Iron Company, and at this time the Railway Company had no goods on hand. A few days after, fifteen trucks of coke came on to the Railway Company's line, and the Railway Company stopped them on their general lien. Justice Mellor held that "the effect of the winding-up order appears to be that of a *quasi* bankrupt, and to place the principal of the Iron Company in the hands of its creditors." Judgment against Railway Company.

In *Wallis* v. *London and South Western Railway* (1870) Baron Channell said—"If a carrier conveys goods under a particular notice, that notice and the acceptance of it may constitute a special contract, which will give him a general lien." (This comment may have led to the subsequent trial between the same parties at Kingston Assizes, where the Company succeeded.)

345. *Rushforth* v. *Hadfield.*—Action against a carrier for stopping goods for payment of a general balance. The package in question was carried from the country to London, and held for a general balance of £78 15s. 7d.

Lord Chief Justice Ellenborough, on appeal, said—"There was no sufficient evidence on which the Jury could find any such general usage as would warrant the conclusion of an agreement between the parties to adopt it. The lien claimed by the carriers for their general balance is not founded on the common law, for by the custom of the realm a common carrier is bound to carry the goods of the subject for a reasonable reward *to be therefor paid*, by force of which he has a lien only for the carriage price of the particular goods. Then what proof is there of any further lien by usage? I will not say that there may not be sufficient evidence of such a general usage for the carrier to let out of his hands the particular parcel on which his common law lien attaches without receiving the carriage price of it at the time upon a general agreement, of which such usage would be evidence, that he may retain any other parcel belonging to the same party for the whole of his demand. But such a general usage ought to be proved by stronger evidence than was offered in this case, especially as it trenches upon the common law right of the subject; but if there be a general usage of trade to deal with common carriers in this way, all persons dealing in the trade are supposed to contract with them upon the footing of the general practice, adopting the general lien into their particular contract. The case, however, does not appear to have gone to the Jury on this view of it. There have been previous dealing between these parties, and there might have been evidence to show, if such had been really the case, that it was understood between them that the carriers were to have a lien on any parcel of goods in their hands for the carriage price of those which had been antecedently delivered. But that was not resorted to, but it was left to the Jury as a case turning on the general usage of carriers throughout the realm to have a lien for their general balance, without any sufficient evidence before them to warrant them in drawing so extensive a conclusion. The oldest instance which could be particularised was not above five years ago, and

but one instance, and that only two years ago, of the exercise of the claim to any considerable amount so as to make it worth while to resist it. To justify, however, so extensive a claim upon the ground of general usage, there ought to be evidence of instances more ancient, more numerous, and more important." The verdict on first trial for carrier was therefore set aside, and a rule for a new trial granted.—*Tried in Court of King's Bench, June* 20, 1805.—*From East's Reports, vol.* 6, *page* 518.

346. *Wright* v. *Snell.*—Action for £58. Plaintiff (Wright) sent fifty crates earthenware from Staffordshire to London, consigned to Robinson. Defendant (the carrier) refused to deliver the crates to Robinson unless paid this £58 carriage, due by Robinson for other goods, as well as the carriage upon the fifty crates. Robinson, it turned out, was only a commission agent, and not the owner of the goods. It appeared that at some previous time Defendants had given Plaintiff printed freight bills, on which was stated—

"That all goods would be considered subject to a lien, not only for the freight of such particular goods, but also for any general balance due from their respective owners;" also "that all goods, from whomsoever received or to whomsoever belonging, should be subject to a lien, not only for the freight of the particular goods, but also for any general balance that may be due from the person to whom they are consigned or addressed."

Justice Bayley said—"The foundation of the lien claimed is that the carriers had given notice that all goods should be considered subject to a lien, not only for the freight of the particular goods, but also for any general balance due from the respective owners. Now, perhaps, as between the real owner of the goods and the carriers, that might be a binding bargain. The real owner, however, in this case was not Robinson, the consignee, from whom the debt is due to the Defendants, but the Plaintiff, who is a perfect stranger to that debt." Justices Holroyd and Best concurred. Judgment against carrier.—*Tried in Court of King's Bench, January*, 1822.—*From Barnewall and Alderson's Reports, vol.* 5, *page* 350.

347. *Clarke* v. *Midland Railway Company.*—Action for wrongful conversion of two train-loads of coal. The senders of the coal had a monthly carriage account with Company, and one of the conditions upon which the account had been opened

was—"The Company have the right to detain any goods in their possession on lien, should the account not be paid in accordance with above conditions." Senders owed the Company a large balance, and the Company stopped the coal. Plaintiff (consignee) pleaded (1) that the coal was in his waggons; (2) that he was the hirer, paying the carriage; (3) that he had paid for the coal by a large sum of money previously advanced to senders for a certain amount of coal per week. Plaintiff relied upon *Butler* v. *Woolcott* (2 Bos. & Pul., New Series), where the law is laid down—"A carrier who by the usage of a particular trade is to be paid for the carriage of goods by the consignor has no right to detain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor." Chief Justice Cockburn held that this did not apply, as here there was an express agreement for a general lien. He thought it was not intended for the Plaintiff to have the coal until actual delivery in London. Verdict, £308 19s. 3d. for Company, with leave to Plaintiff to appeal. On 12th January the appeal was tried before the Chief Justice and Justices Wightman, Crompton, and Hill, and they unanimously confirmed the verdict already given.—*Tried in Queen's Bench, January* 12, 1859.—*From English Clearing House Reports, No.* 79, *page* 85.

348. *Official Liquidator of Northfield Iron and Steel Company* v. *Midland Railway Company.*—Action by the Midland Company for balance of a ledger account in satisfaction of which they had detained certain goods. In December, 1863, the Northfield Iron and Steel Company entered into a contract with the Midland Company to have a monthly ledger account, and one of the conditions was "*that if the account was not paid when due the Midland Company were to have the right at any time to detain any goods or waggons in their possession, by way of lien, to secure the general balance to them.*" On the 22nd March, 1866, a petition was lodged to wind up the Steel Company, and accordingly on the 21st April an order by the Court was made to wind it up. At the time the petition was lodged the Midland Company had no goods on hand belonging to the Steel Company. On the 27th March, five days after petition was

lodged, the official liquidator sent goods from the Steel Company to the Midland Company for carriage. The Midland Company detained them for the unpaid ledger balance, and claimed a lien thereon. The official liquidator then took out a summons against the Company under the Company's Act, 1862, sec. 84. The Chief Clerk found in favour of the official liquidator, and the Company appealed to the Master of the Rolls. The official liquidator contended that the goods that had since come to the Midland Company's hands had so come to them as agents for him, and that he, being in the position of a trustee of all the property of the Steel Company for the creditors thereof, the Midland Company, as his agents, were bound to deliver to him the goods in question. Lord Romilly said—"I am of opinion the Chief Clerk is wrong, and the summons in this case must be dismissed. I am not going to dispose of the case on the question of agency. I think that if the official liquidator wants the goods which are now in the hands of the Midland Railway Company, he must pay to that Company the debt due to it for the carriage of the goods before the winding-up order. The official liquidator continued to send goods, and it must therefore be implied that he sent them under a continuation of the original contract between the parties. But if that is so, he was bound to give the Midland Company express notice if he wished to determine the contract. Perhaps, indeed, if he had done so the Railway Company would have declined to convey the other goods except on the terms of being paid for those previously carried. It is possible that the goods could not have been conveyed by other agents except at a greater cost, but I think that the Midland Company could not have been compelled to carry them except upon the terms I have mentioned. The costs of all parties must come out of the estate of the Steel Company."—*Tried in Rolls Court, July* 2, 1866.—*From Law Times Reports, vol.* 14, *page* 695.

349. *Kinnear* v. *Midland Railway Company.*—Action as a lien upon a colliery locomotive engine sent to the Company for repairs. The colliery proprietors had become bankrupt, and owed the Company the sum of a monthly ledger account for carriage of coal. The Company had opened the

account on specified conditions, one condition being the Company "to have the right at any time to detain any goods or waggons in their possession, by way of lien, to secure the general balance owing to them." The Court (Chief Baron Kelly and Barons Channell, Pigott, and Cleasby) held that the condition was intended merely to enlarge the rights of the Company *as carriers*, and to give them a right of lien beyond what they could have at common law for carriage, and did not apply to the engine in question, which was delivered, not under any contract to carry, but under an agreement to repair, to which the charge of haulage to the Company's locomotive works was only incidental, and that therefore the right of a general lien did not attach. Judgment against Company.—*Tried in Court of Exchequer, Nov.* 23, 1868.—*Law Times Reports, vol.* 19, *page* 387.

350. *The Wiltshire Iron Company* v. *Great Western Railway Company.*—Action in respect to carriers' lien. The Wiltshire Iron Company, having works at Seend, with a siding from the Great Western Railway, became bankrupt, and on the 16th November, 1866, an order for winding up the Company was made by Vice-Chancellor Stuart, under the Company's Act, 1862. At this time the Iron Company owed the Railway Company over £2,000 for carriage. At a private meeting of creditors it was arranged to carry on the iron works, so as to effect a sale of them while in actual work. This was on the 19th November. Between the 21st and 23rd November fifteen trucks of coke were stopped by the Railway Company, in exercise of their lien, for the general balance due. These waggons of coke, however, had not come on to the Railway Company's line until after the 16th November, the date of the winding-up order in Chancery.

On the 10th March, 1864, an agreement had been entered into between the Iron Company and the Railway Company in respect to the opening of a ledger account, and one of the conditions of the agreement was as follows:—

"The goods and waggons belonging to or sent by the person having a ledger account shall be subject to a general lien in favour of the Company for all moneys due to the Company from such person on any account, taking effect at the option of the Company at any time after failure of the payment of any

sum appearing due on the credit accounts, or, in the case of bankruptcy, insolvency, or stoppage of payment, to take effect at any time for any sums appearing due in the books of the Company."

Justice Mellor said—"We are of opinion that our Judgment must be for the Wiltshire Iron Company. The effect of the winding-up order appears to be that of a *quasi* bankruptcy, and to place the principal of the Company in the hands of its creditors. The Railway Company cannot therefore make any such claim as is contended for, the goods having got into their hands after the date of the winding-up order. Under all the circumstances the Railway Company could not avail themselves of their general lien, which, though valid if the Iron Company had not been wound up, could not be put in force after the date of the winding-up order." Judgment against the Railway Company.—*Tried in Court of Queen's Bench, November* 18, 1870.—*From Law Journal Reports, vol.* 40, *page* 43.

FIRE AND SPARKS FROM ENGINES.

FIRE AND SPARKS FROM ENGINES BURNING AND DAMAGING PROPERTY ADJACENT TO RAILWAYS.

	Case No.		Case No.
Pigott v. *E. C.* (1846)	351	*Dimmock* v. *N. S.* (1866)	356
Vaughan v. *Taff Vale* (1858) ...	352	*Blosse* v. *M. G. W.* (1867)... ...	357
Freemantle v. *L. & N. W.* (1861)	353	*Jones* v. *Festiniog* (1868)	358
Plunkett v. *G. S. & W.* (1862) ...	354	*Smith* v. *L. & S. W.* (1873) ...	359
Longman v. *G. J. C.* (1863) ...	355		

351. *Piggot* v. *Eastern Counties Railway Company.*—Action for a shed having been burnt down, owing to a spark from an engine. Witnesses stated that by using certain precautions, as a cap for the top of the funnel, or a fire plate, or shutting off steam when an engine approached buildings, the emission of sparks might be prevented or much diminished, but that there would be less draught, and the engines would consequently be not so powerful. A witness was asked whether, when standing near the railway, he had observed sparks of fire emitted from the funnel of the engines, and carried to some distance. This question was objected to, but allowed by the Judge. A verdict was given for the Plaintiff. The case was first tried before Baron Alderson, Chelmsford Spring Assizes. The Company obtained a rule *nisi* to set this verdict aside on the ground of improper reception of evidence, and also that the verdict was against the evidence. On the appeal case Chief Justice Tindal said—"The law compels the Company to take care that the fire from their engines shall not be injurious to the public. The evidence was that the fire which caused the destruction came from the engine; this called upon the Company to show that reasonable care was used. It seems to me the Jury were right in their general conclusion. The evidence was clearly admissible for the purpose the Judge received it, viz., to see how far an engine would carry a spark. Justice Coltman concurred, and said—

"The setting fire to a barn is *primâ facie* evidence of negligence, though not conclusive. Upon the whole of this case it was reasonable to infer want of care." Justice Maule concurred, and said a witness had stated that the Company might, by a greater expenditure of money, have had engines which would not have thrown out sparks. Judgment against Company.—*Tried in Court of Common Pleas, June* 2, 1846.—*From Law Journal Reports, vol.* 15, *page* 235.

352. *Vaughan* v. *Taff Vale Railway Company.*—Action for damage done to a wood by fire, originating from sparks or live coals coming from Company's engine and setting fire to grass on the banks and to a wood. The case was first tried at the Glamorganshire Spring Assizes, 1858, before Baron Bramwell, when the Jury gave a verdict for Plaintiff. The Company appealed, when Baron Bramwell gave Judgment—"The line passed *in* a bank by the side of Plaintiff's wood; on the side of the bank was tall dry grass of very combustible character. Whether the fire arose by first setting light to the grass or by throwing lighted matter on the Plaintiff's land was not determined by the Jury. It must be taken to be true that everything practicable had been done to the locomotive to make it safe—that a cap had been put to its chimney, that its ash-pan had been secured, that it travelled at the slowest pace consistent with practical utility; that if its funnel was more guarded and its ash-pan more secured, or if its pace was slower, it could not be advantageously used. But it was admitted that, with these precautions, the locomotive was the cause of the fire to the grass, not daily, but occasionally. It stood confessed the locomotive was productive of mischief and its use was dangerous, and that setting fire to the grass was one of the habitual accidents of its use. If the Company had kept their banks shorn of grass, or had a line of gravel or stone between their land and Plaintiff's, in all probability the fire to the wood would not have happened. The Company say if the fire originated in their own land they are protected by 14 Geo. III., cap. 17, sec. 84. But we are of opinion that statute does not apply where the fire originates in the use of a dangerous instrument knowingly used by the owners of the land on which the fire breaks

out. The Railway Clauses Act, 8 Vic., cap. 20, sec. 86, was pleaded as a defence to this action. Whether it would if there were no negligence other than the use of a dangerous instrument it is not necessary to say. We think the direction was right, the verdict satisfactory, and the rule must be discharged." Verdict against Company.—*Tried in Court of Exchequer, November* 19, 1858.—*From Law Journal, vol.* 28, *page* 41.

The Company appealed to the Exchequer Chamber, when Chief Justice Cockburn and the other Judges reversed this decision, the decision of the Court below being against the authority of *The King* v. *Pease* (2 Law Journal Reports, M.C., 36). It was held that a railway company are not responsible for an accidental fire caused by a spark falling from one of their engines upon premises adjoining the railway if they have taken every precaution that science can suggest to prevent injury. They are not liable unless they are guilty of some negligence in fact, and negligence cannot be implied from the mere employment of locomotive engines, as the use of them is expressly permitted by the Legislature. Judgment for Company. —*Tried in the Exchequer Chamber, May* 12, 1860.—*Law Journal, vol.* 29, *page* 247.

353. *Freemantle, Bart.*, v. *London and North Western Railway Company.*—Action for a wheat rick, situated close to railway, set on fire and destroyed by sparks from an engine. The case was first tried before Justice Williams, at the Buckingham Spring Assizes. When he charged the Jury he said—"It remains to consider what is to be regarded as negligence on the part of the Company, for the consequences of which they are to be held responsible." The Judge laid down no rule of law, but left to the Jury as a matter of fact—(1) Whether the engine was of proper construction; (2) whether caps or bonnets should or should not have been fitted to the engine; (3) whether the fire could have occurred from any other cause. The Jury gave a verdict for Plaintiff. The Company moved for a new trial, on the ground of the verdict being against the evidence, and of misdirection on the part of the Judge, as sufficiently explained in the Judgment of the Court. Chief Justice Erle, on the appeal case, refused a rule for a new trial, alleging that the Judge had left to the Jury all the questions raised before him, with clear

discrimination and sound judgment. Verdict against Company.—*Tried in Court of Common Pleas, April* 22, 1861.—*From Law Journal Reports, vol.* 31, *page* 12.

354. *Plunkett* v. *Great Southern and Western Railway Company.*—Action for £300, value of a stable and a horse destroyed by fire from a spark from engine. The horse, valued at £100, was so injured that it had to be shot. Plaintiff proved (1) the stable was safe before the train passed; (2) the wind was blowing from the line to the stable, which adjoined the line; (3) that igneous matter was seen coming from engine funnel on to thatch of stable, and remaining until it caught fire; (4) the Company burned coal instead of coke, and had not availed themselves of modern and other improvements to guard against fires caused by the working of engines. The Company pleaded that (1) Parliament authorised them to burn coal provided they consumed the smoke; (2) the principles of construction, materials of engine, were of best quality, and it was worked by a careful man. Messrs. Miller, Cabrey, Atock, and Wakefield, locomotive engineers, proved the quality of engine. The Chief Justice put it to the Jury whether the Company were guilty of negligence in construction of engine, conduct of servants, or quality and kind of fuel. The Jury found for the Company.—*Tried before Lord Chief Justice and Special Jury, Naas Assizes, July*, 1862.—*From Irish Clearing House Reports.*

355. *Longman* v. *Grand Junction Canal Company.*—Action for £707 for damage to goods from sparks from a canal steamboat. At Home Park Paper Mill, at Abbot's Langley, adjacent to the canal, there were stacks of paper shavings, waste, and refuse paper used in the manufacture of paper. These stacks were thatched with straw like hay ricks. A witness swore he saw sparks from the engine funnel fly out upon one of the stacks. The whole of the stacks were burnt, likewise some carboys of vitriol and other goods. Scientific evidence was produced by Plaintiff as to various mechanical inventions to prevent sparks flying out of engine funnels, such as caps for furnaces, &c. It was elicited from the Company's witnesses that there were two kinds of coal used, one of which caused less sparks than the other, and, further, that coke was sometimes

used to make a clear fire. Sir Charles Fox, for Defendants, stated that though, "out of deference to the prejudices of the agricultural districts," precautions against the emission of sparks were sometimes used in agricultural steam engines, they had for the most part ceased to be used in railway locomotives. Baron Bramwell left the case to the Jury, telling them that they must be of opinion, in order to find for the Plaintiff, that the fire was caused by the engine of the Company, and that they had been guilty of negligence, which he defined to be the neglect of any reasonable, practicable precautions, or precautions which the Company reasonably ought to have used to prevent the emission of sparks from their engines. Verdict against Company for £707. — *Tried at Hertford Summer Assizes*, 1863.—*From Foster and Finlason's Reports, vol.* 3, *page* 736.

356. *Dimmock* v. *North Staffordshire Railway Company.* —Action for £2,300 for destruction of timber in a timber yard from sparks from engines. The timber yard was close to the Company's Stoke station. The fire, which was first observed soon after five or six in the morning, broke out in a tarpaulin shed of Plaintiff's within a few feet of the line, and about 50 yards long. The fire spread thence to the timber yard and to the whole of the premises, which were entirely consumed. One witness said he had seen a spark actually settle on the roof of one of the sheds shortly before the fire broke out. Other persons saw sparks "as large as walnuts" on the night before the fire. The Company contended the fire arose *inside* the shed, where there was a fireplace, and had been a fire used by the workmen, but which, it was said, was raked out overnight.

Sir Charles Fox, Mr. F. J. Bramwell, Mr. Johnstone, and Mr. M'Connell, all engineers, were called, and pretty well agreed that "bonnets" on the top of the engine funnels had been discarded as useless to prevent sparks flying out; also that coke had been used, and interfered with the power of the engine.

Justice Keating left it to the Jury to say whether there were any means which the Company ought to have adopted to prevent the emission of sparks. The Jury said they found for the Plaintiff, but, in answer to questions from the learned

Judge, said that they thought there was no negligence of the Company in respect of the engines or their mode of managing them in the use of coke or otherwise. Verdict for Company.—*Tried at the Staffordshire Lent Assizes*, 1866.—*From Foster and Finlason's Reports, vol.* 4, *page* 1058.

357. *Blosse* v. *Midland Great Western Railway Company.*—Action for £15 for damage to a plantation, alleged to have been set on fire by sparks from engine, at Athnavilla, between Castlebar and Athlone. The shepherd saw the train pass, but saw no sparks emitted, but proved the plantation was safe before the train passed, and after it had passed the plantation was in a blaze.

The case was first tried at the Mayo County Court, where it was dismissed. Plaintiff appealed, and on the appeal case Justice Christian said that had the engine set the plantation on fire, the Legislature having sanctioned the use of locomotives, and the locomotives requiring fire to propel them, he was not at all satisfied that sparks flying from the engine (which, perhaps, no mechanical contrivance could intercept) would necessarily imply negligence. Judgment for Company.—*Tried at Mayo Assizes, March* 6, 1867.—*From Irish Law Times, vol.* 1, *page* 195.

358. *Jones* v. *Festiniog Railway Company.*—Action for £42 for a stack of hay set on fire by sparks from an engine conveying a train of passengers. The Company, owning a tramway, were authorised by the Board of Trade to carry passengers, but they were *not authorised* by Act of Parliament to use steam locomotives on the tramway. Justice Blackburn said—"The Company in the present case use a locomotive engine, from which sparks were liable to escape, and at *common law* they must at their peril take precautions to prevent that escape; and where sparks do escape without any actual negligence on the part of the Company, and do injury, the Company must pay damages for the injury." Judgment against Company.—*Tried in Court of Queen's Bench, January* 24, 1868.—*From Law Times Reports, vol.* 18, *page* 902.

359. *Smith* v. *London and South Western Railway Company.*—Action for value of cottage burnt, near the Company's

railway, from sparks from an engine. The weather had been unusually dry; some workmen on the line had been trimming the hedges, tufts of grass, &c., on the railway embankment, and these trimmings had been allowed to lie a fortnight, until they had become in a very combustible state. About a quarter to one o'clock on the day of the fire these workmen were seen sitting on the railway bank near to the spot, but on the opposite side of the line, eating their dinner and smoking. A train was seen to pass a few minutes afterwards, and shortly after that, and about 1 p.m., the fire was seen burning. The workmen tried to extinguish the fire, but a high wind which was blowing carried the fire through the hedge and diagonally across a stubble to Plaintiff's cottage, 500 yards off, and the cottage was burnt down. A verdict was given by consent for the value of the cottage, with leave to the Company to appeal to set it aside and enter a non-suit, the Court to draw inferences of fact and amend the pleadings in any way the facts would warrant.

On the appeal case Chief Justice Bovill said—"The question is whether there was evidence to go to the Jury, and I think there was evidence for them on the second count. There was abundant evidence to show that the fire was caused by the engine of the Company. It is true that this alone would not be sufficient to give the Plaintiff a cause of action, because the Legislature has thought fit to authorise the use by the Company of locomotives, and there was no evidence that they were improperly constructed or carelessly managed. Looking to the weather, the combustible material on the banks, the combustibility of the stubble, all tending to reduce the distance (between the embankment and the cottage), there was evidence for the Jury from which they might come to the conclusion that the Company were guilty of negligence, and that therefore our Judgment must be for the Company." Justice Keating concurred. Justice Brett dissented, and said—"I agree that the Company ought to anticipate that sparks would escape from their engines, and that the materials might be set on fire; but I think that they would not further reasonably anticipate that there would be an unusually high wind, or that the fire would run from the materials on the banks for some hundred yards across a stubble field and a lane; and therefore it seems to me

they were not guilty of the omission of any duty towards the Plaintiff. If the Plaintiff's property had been combustible and near the railway, there would, I think, have been evidence to go to the Jury (*Vaughan* v. *Taff Vale*). Bringing one's knowledge of ordinary English life to bear on the case, it seems to me that no one, or at least few persons, would *à priori* have anticipated that, if the materials on the banks caught fire, the fire would extend in the way it did." The majority of the Court being for Plaintiff, the Judgment was against the Company.—*Tried in Court of Common Pleas, January* 11 *and* 13, 1870.—*From Law Journal Reports, vol.* 39, *page* 69.

The Company appealed to the Exchequer Chamber, where it was held that, negligence being established, the Company were liable for all the consequences, although the extension of the fire to the Plaintiff's cottage was an accident which no reasonable person could have anticipated. Judgment affirmed. —*From Law Journal Reports, vol.* 40, *page* 21, *C.P.; also in Law Times Reports, vol.* 23, *page* 687.

LOCOMOTIVE ENGINES BEING REQUIRED TO CONSUME THEIR OWN SMOKE.

Case No.
Manchester Sheffield & Lincolnshire Railway v *Wood* (1859) ... 360

360. *Manchester Sheffield and Lincolnshire Railway Company* v. *Wood.*—Prosecution by Justices against Manchester Sheffield and Lincolnshire Railway Company, under the Railway Clauses Act (8 Vic., cap. 20, sec. 124), for using an engine which did not consume its own smoke. The section of the Act runs—

"Every locomotive steam engine to be used on the railway shall, if it use coal or other similar fuel emitting smoke, be constructed on the *principle of consuming* and so as to consume its own smoke; and if any engine be not so constructed, the Company or party using such engine shall forfeit five pounds for every day during which such engine shall be used on the railway."

The Justices convicted the Company. The Company appealed to the Court of Queen's Bench, when Chief Justice Cockburn said—"The words of the Act are 'constructed on the principle of consuming and so as to consume its own smoke.'

Now it may be that it is not the fault of the engine, but of the person who uses it. I think, therefore, we should send this case back to the Justices, with our opinion that they ought to inquire whether the emission of the smoke was the fault of the engine or of the person who had the management of it." Justice Blackburn—"The Justices have found that in consequence of the engine smoking on the occasions mentioned, that is conclusive evidence of its not being constructed on the principle of consuming its own smoke. In this they were wrong." Justice Hill concurred. Judgment for Company.—*Tried in Court of Queen's Bench, November* 16, 1859.—*From Law Times Reports, vol.* 1, *page* 31; *also in Law Journal Reports, Magistrates' Cases, vol.* 29, *page* 29.

ACTIONS AGAINST RAILWAY COMPANIES ON THE GROUND OF NUISANCE, SPARKS, VIBRATION, &c.

	Case No.		Case No.
The King v. *Pease* (1832)	361	*Smith* v. *Mid.* (1877)	363
Brand v. *Hammersmith and City* (1865)	362		

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361. *The King* v. *Pease.*—An indictment by King William IV. against Pease and others for using locomotive engines, and thereby creating noisome smokes, corrupting the air, and with the engine fires exhibiting terrific and alarming appearances, and making divers loud explosions, shocks, and noises. These engines ran on a colliery line between Stockton and Yarm, and for a mile ran alongside the public highway. The line was made under the Acts of 1 & 2 Geo. IV., cap. 44, sec. 6, and 4 Geo. IV., cap. 33, sec. 3. Justice Parke held that the interference with the rights of the public must be taken to have been contemplated and sanctioned by the Legislature, since the words of the statute authorising the use of engines were unqualified, and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not) showed at least that there was nothing unreasonable in a clause of an Act of Parliament giving such unqualified authority. The Judge said—"There is nothing unreasonable

or inconsistent in supposing that the Legislature intended that the part of the public which should use the mile of highway should sustain some inconvenience for the sake of the greater good to be obtained by other parts of the public in the more speedy travelling and conveyance of merchandise. Can anyone say that the public interests are unjustly dealt with when the injury to one line of communication is compensated by the increased benefit of another? It was held by the majority of the Judges in *Rex* v. *Russell* (6 B. & C., 566) that a nuisance was excusable on that principle at common law." Judgment for Defendant.—*Tried at the Yorkshire Lent Assizes*, 1832, *by a Jury of that county* (on a suggestion that an impartial trial could not be had in the county of Durham).—*Barnewall and Adolphus's Reports*, *vol.* 4, *page* 30.

362. *Brand* v. *Hammersmith and City Railway Company.*—Action for compensation for nuisance (1) for the obstruction of light and air and way; (2) for damage to the garden by lime, dust, and smoke in the course of construction of the railway; (3) for that the working of the railway and the running of the trains over it, after it had been constructed and opened for traffic, had occasioned and always would occasion vibration, noise, and smoke, and that the premises, by reason of their being subject to such vibration, noise, and smoke from passing trains, were and always would be affected and further depreciated in value. The Plaintiff was the owner of a house and garden adjoining the railway, but none of his land had been taken for the purposes of the railway.

Justice Mellor, in giving Judgment, said—"It appears to me that the only injury in respect of which this item of compensation is awarded by the Jury is for the exercise of the power of using locomotive engines upon a railway already constructed. It is an act expressly authorised, if it be done in the ordinary course of business of the railway without negligence, because I quite agree that if a railway company which is authorised to use locomotive engines upon a railway so constructed does exercise its powers in a negligent way, so as to cause any injury from the negligent use of the powers in the mode of running their trains, that then an actionable injury

would thereby be sustained, upon which an action would lie at common law. Lord Campbell's opinion was that the true distinction lay between damage resulting from the execution of the work and damages resulting from the exercise of the powers conferred on railway companies using locomotive engines upon the railway for the benefit of the public when the works were constructed. I cannot shut my eyes to the fact that, being authorised by law to be done by the Company, no action lies. For these reasons I am of opinion that our Judgment must be for the Company." Justice Lush concurred.—*Tried in Court of Queen's Bench, November* 17, 1865.—*From Law Times Reports, vol.* 13, *page* 501.

363. *Smith* v. *Midland Railway Company and Lancashire and Yorkshire Railway Company.*—Action for abatement of smoke nuisance. The Plaintiff's mansion of Netherheys is situated close to the Colne Station. Some years ago the Midland Railway Company built an engine-shed for two engines, and the two engines occupying it caused no smoke nuisance. The Midland Company, however, had given the Lancashire and Yorkshire Company use of the shed and sidings, and the engines in 1875 had increased to seven and ten at a time on the sidings day and night, and were constantly emitting smoke and noxious vapour, which the wind carried over Plaintiff's garden into the windows of his residence, leaving a deposit of black soot and sticky matter upon the trees and shrubs and the walls and windows of the house. The Company contended that their statute authorised them to commit even a nuisance, provided they worked their line properly. Vice-Chancellor Bacon held that the statute had not deprived the Plaintiff of his ordinary rights, and did not authorise the nuisance complained of; that the emission of smoke and noxious vapour during the operations of cleaning the engines and re-lighting the engine fires was not a necessary evil incident to the proper working of the line, or a reasonable user of the land for the purpose of the railway within the scope and meaning of the Railway Clauses Act, 1845; and that Plaintiff was entitled to the relief, with costs. Judgment against Company.—*Tried in the Court of Chancery, July* 24 *and* 25, 1877.—*From Law Times Reports, vol.* 37, *page* 224.

PARLIAMENTARY TOLLS
(GOODS AND PASSENGERS).

Case No.

Rice v. *Dublin Wicklow and Wexford* (1858) 364
Railway companies cannot charge for fractions of a mile in estimating third class fares.

Field v. *Newport Abergavenny and Hereford* (1858) 365
A company must demand tolls for coal in owner's waggons separate from a charge for running the waggons back empty to be reloaded.

Pegler v. *Monmouthshire* (1861) 366
Company held to have no power to legally charge for terminals when such charge, added to tolls, raised the total charge to an amount over and above the Company's maximum tolls.

Garton v. *Bristol and Exeter* (May, 1861) 321
Companies can by their own special Acts fix their own charge for articles under 500 lbs. weight.

Strick v. *Swansea Canal Company* (1864) 367
Charge for short distance.

Monmouthshire Railway v. *Williams* (1872) 368
A railway company has power to make a charge for stopping at a junction to take up waggons.

Lancashire and Yorkshire v. *Gidlow* (1873) 369
When double tolls are not collectable under the six mile clause.

Wrexham Mold and Connah's Quay v. *Little Mountain Company* (1877) 370
Special clause in a company's Act whereby they could make a contract to carry at a higher rate than their Parliamentary toll authorised.

Aberdeen Commercial Company v. *Great North of Scotland* (1878) 371
The railway refused to carry packed manures at the tolls for manure.

Watkinson v. *Wrexham Mold and Connah's Quay Railway* (1879) 372
When a company's tolls include the supply of waggons, the company is not entitled to collect the full toll when waggons are not supplied by them.

Pryce v. *Monmouthshire* (1879) 373
A company has a right to charge for quarters of a mile at the *pro rata* mileage rate.

Brown v. *Great Western* (1882) 670
The Court of Appeal held the Company may charge for a fraction of a mile as a mile on third class fares.

364. *Rice* v. *Dublin Wicklow and Wexford Railway Company.*—Action for alleged overcharge of one halfpenny on a passenger fare, Westland Row (Dublin) to Merrion, a distance of two miles and a half and 257 yards. The Company claimed the third class fare as 2½d., and the dispute was that the Company had no right to charge ½d. for the half mile.

It was held, on demurrer, that the General Railway Act 7 & 8 Vic., cap. 85, applied to the present case, and that inasmuch as by section 6 of that Act the fare is to be measured by the number of miles actually travelled, without taking fractional distances into account, in the absence of any power in the special Acts of the Company to charge for such distances, they had been guilty of an overcharge, and were liable to the present action. Judgment against Company.—*Tried in Court of Common Pleas, May 5 and* 8, 1858.—*From Irish Reports, Common Law, vol.* 8, *page* 160.

365. *Field* v. *Newport Abergavenny and Hereford Railway Company.*—Action for £437, tolls on coal conveyed on the Company's line, both in Plaintiff's and Company's waggons, and for conveying back Plaintiff's empty waggons to be reloaded, during the period between October, 1854, and April, 1855. Previous to October the rate was 2s. 11¾d. per ton in owner's waggons and 3s. 4d. per ton in Company's waggons. After October the Company charged 3s. 6d. in owner's waggons and 3s. 6d. in Company's waggons. In both cases the charge included the conveyance back of the empty waggons. The total of the monthly accounts for the period claimed was £437. The Company, by their Act of 1846, sec. 29, were empowered to charge certain tolls, and at this scale the total charge would have been £315. Deducting this from the £437 leaves £122 as the amount charged over the tolls for the conveyance of the empty waggons, and this is at the rate of nearly ¾d. per ton for the waggons, there being 314 waggon journeys, the average weight of a waggon being 4 tons. The Plaintiff objected to pay the advanced rate, and disputed the Company's right to charge it. The Company, under the Clauses Consolidation Act of 1845, 8 Vic., cap. 20, were authorised to distrain for tolls. In April, 1855, Plaintiff applied for an explanation of

the advanced rates, which was not given. On April 29th the Company's manager, by letter, applied for payment of the £437, giving notice that, if not paid by 3rd May, certain waggons and coal then detained by the Company would be sold. Plaintiff, in answer, applied on 29th April to know (1) how much was charged per ton per mile for tolls; (2) for locomotive power; (3) for waggons; and in respect of what other duty, and for how much, was the remainder of the charge made up. The Company declined to enter into the details of the rates charged. On May 4th the Company advertised the sale. On the 5th May Plaintiff produced, tendered, and offered £365 to Company's manager. It was refused, except on account, but Plaintiff refused to pay it except as a full discharge. On May 11 the waggons and coal were sold for £448, and the balance tendered Plaintiff and refused. The case was tried at Gloucester Assizes, 1856, before Baron Alderson, but not settled. It then came before the Court of Exchequer, when Baron Bramwell gave Judgment—"The Plaintiff is entitled to our Judgment. The Company profess to have distrained his coal and waggons (under the Railway Clauses Act) for tolls due to them, but they were not empowered to do so except upon demand and refusal, and there has been no such demand and refusal of the tolls for empty carriages. There was a demand for a certain sum made of two claims, one for tolls properly so called and the other for the empty carriages, but the claims were not separately stated; if they had been, there would have been a demand for each of them. It was not so; there was a claim only of a sum in gross as due for tolls, and therefore, unless both the sums are due for tolls, there has been no demand of the sum due for empty carriages. The Company maintain that they are entitled to charge for the empty waggons, and I think they are; but it would be absurd to suppose that they are to bring them back for nothing. But then their claim is not for tolls within the meaning of the Act, so that their demand of a sum due for tolls did not include it. No doubt the demand of a sum larger than the sum due may be a demand of the sum due in a sense under some circumstances and for certain purposes, but it is not so in such a case as the present. A demand sufficient to sustain a distress under a

statute like that in question must be such a demand that the party not complying with it can be said to have refused or failed to pay that which is demanded. And there cannot have been a demand in that sense when there has been only a demand of a sum in gross, including the claim in question, but which is not in any way separated or described. Therefore the Company had no right to distrain the Plaintiff's waggons, and they have no answer to this action. It is true that there are facts whence an implied agreement may be inferred to pay *quantum meruit* for the carriage of the empty waggons, but it is not competent for them to set up such a claim in that form, never having been made." Baron Watson concurred. Thus a tender of a certain sum as being "all that is due" is bad. A demand of a certain sum made up of two sums claimed on two distinct grounds is not "a demand" of either. Verdict against Company.—*Tried in Court of Exchequer, June* 10, 1858.—*From Law Journal Reports, vol.* 27, *page* 396, *Exchequer.*

366. *Pegler* v. *Monmouthshire Railway and Canal Company.*—Action for 12s. 6d., terminal charges alleged to have been illegally charged. Plaintiff, a grocer, had consigned to him 100 sacks flour, Newport to Pontypool, weighing 12½ tons. The Company charged him £2 10s., which was made up of 3d. per ton per mile, with 12s. 6d. terminal charge. Plaintiff paid the Company the amount under protest, and sued for the 12s. 6d. as money had and received. Plaintiff contended the Company's maximum toll of 3d. per ton per mile was all they could charge. The Company contended that that amount was simply the toll when they did not act as carriers on their own line; but when they acted as common carriers as well as toll collectors of the railway, they were entitled to make a terminal charge for services, conveniences, and expenses—for receiving the flour by their porters when brought to the Newport station; for the weighing and invoicing; for the loading on to their trucks; for the use of their station, yards, sheds, and platforms at Newport and Pontypool; for the gas light and other conveniences for receiving, loading, and unloading; for the making of entries of the receipt and delivery of the flour; for the risk incidental to the loading, carrying, and unloading. Baron Bramwell said—"I concur with the Chief Baron that these

terminal charges cannot be made. The Company argue that the tolls in their Act of Parliament do not apply in cases where the Company act as common carriers. The Company might say—'Here is the railway, and here are the trucks, and here is the locomotive engine. You must drive it yourself; we will not undertake any responsibility.' But they did not do so here. They took the goods without any such stipulation. Sec. 128 (Company's Act 8 & 9 Vic., cap. 100) requires not only that they should be common carriers for hire, but common carriers for hire upon the tolls named in the Act, otherwise that section would be nugatory. It seems to me the Company having made no previous bargain with the Plaintiff for any further sum, they are not entitled to make any further claim upon him. Without expressing any definite opinion on the matter, I can understand the Company may say—'Very well, we must carry your goods, but we will do nothing to help you. You shall bring your goods and put them down in order that we may load them, and then we will load them, and we will unload them, and we will afford you no facility in taking them away; you may pick them up.' It may be that the Plaintiff, rather than do that, will say—'I suppose I must pay you something for what would be a convenience to both of us.' That may be; but then that must be done by way of a bargain. But in the absence of any bargain to pay anything more than the tolls, if the goods are delivered to the Company, they must be taken to take them upon the statutory tolls where the statutory tolls apply, and I am of opinion that they do apply in cases where they are common carriers. I think, therefore, the Plaintiff is entitled to our Judgment." Chief Baron Pollock and Barons Martin and Wilde delivered Judgments positively against the Company, without the qualifications introduced by Baron Bramwell. Verdict against Company.—*Tried in the Court of Exchequer, April* 25, 1861.—*From Law Journal Reports, vol.* 39, *page* 249.

367. *Strick* v. *Swansea Canal Company.*—Action in respect of undue preference in regard to rates on a canal. The Plaintiffs had occasion to only carry coal over the Defendants' canal three and a half miles, from Clydach to Swansea, and were charged 1½d. per ton per mile, while other persons carrying coal

over the canal for longer distances were charged ¾d. per ton per mile.

Chief Justice Erle said—"Our Judgment is for the Canal Company. It has been argued that the equality clause (8 & 9 Vic., cap. 28) takes from the Company the power of making this difference in their charges. But it is laid down as a principle, in the case of railway companies, that where they are in the habit of conveying a large quantity of goods for a great distance, they may vary the dues generally charged by them according to what they may think calculated to promote their interests. Now I think that this principle applies, though not to the same extent, to a canal company who are willing to make an abatement in their tolls in favour of those who agree to supply a large quantity of the same kind of goods for conveyance by the canal. The schedule of charges was very likely framed with ample knowledge of the conditions of the traffic, and I think that those who confer a benefit upon the Company by more frequently availing themselves of the canal are in the same position as if they paid the Company at a higher rate." Justices Willes and Byles concurred. Judgment for Company.—*Tried in Court of Common Pleas, April* 25, 1864.—*From Law Journal Reports, vol.* 33, *page* 240.

368. *Monmouthshire Railway and Canal Company* v. *Williams.*—Action in respect to tolls and charge for "stopping." By the 8 & 9 Vic., cap. 169, sec. 104, the Monmouthshire Railway Company were empowered to demand in respect of coals conveyed upon their railway tolls not exceeding ½d. per ton per mile; and by section 105, for articles conveyed on the railway for a less distance than four miles, the Company may demand, in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of *stopping*, loading, and unloading. The 24 & 25 Vic., cap. 217, sec. 26, enacts that the maximum rates to be taken by the Company for the conveyance of all things, including the tolls for the user of the railway for carriages (when provided by the Company), and for locomotive power, and for other expenses incidental to the conveyance, except a reasonable sum for loading, covering, and unloading of goods at any terminal station of such goods, and for delivery and collection, and any other service incidental to

the business or duty of a carrier, shall not exceed the sums following, that is to say, for coals 1d. per ton per mile.

The Defendants, a number of separate colliery owners, in the course of their business loaded coals into their own trucks at their respective mines, and sent the trucks so loaded by the Brecon and Merthyr Tydfil Railway Company to a terminal junction on the Plaintiffs' line, whereupon the Plaintiffs sent an engine to fetch the train of trucks thence and to draw the same along their own line, in order to deliver the trucks at the wharves of the different freighters. The Plaintiffs' engine had to stop at the junction and occasionally wait there during a period of about half an hour for the arrival of the Defendants' trucks.

The Court of Exchequer held that this was a "stopping" for which a reasonable charge might be made by the Plaintiffs, under section 105, in addition to the tolls for conveyance; and that the limitation of rates by the 24 & 25 Vic., cap. 223, sec. 26, to 1d. per ton per mile for coals did not comprise or include such charge for stoppage, and was not incidental to the conveyance of the goods. The Court of Exchequer Chamber affirmed that Judgment. Judgment for Company.—*Tried in the Court of Exchequer Chamber, June* 24, 1872.—*From Law Times Report, vol.* 27, *page* 134.

369. *Lancashire and Yorkshire Railway Company* v. *Gidlow.*—Action for £673, alleged overcharges on coal from 31st December, 1865, to 13th June, 1866, Hindley to Wigan Junction. The railway from Hindley to Wigan Junction belonged to the Lancashire and Yorkshire Company. The coal from Wigan Junction was sent on to Windermere over the North Union Railway. The North Union Railway was a joint line owned by the Plaintiffs (Lancashire and Yorkshire Company) and the London and North Western Company. The Lancashire and Yorkshire Company claimed 6d. per ton under their six mile clause for the two and a quarter miles between Hindley and Wigan Junction. Two coal declarations were given with the coal, one to the Lancashire and Yorkshire Company at Hindley, and the other was nailed to the waggon for the London and North Western Company to get at Wigan Junction, as that Company worked the North Union Line. Sender refused to pay the

Company's account on the ground that, seeing the Lancashire and Yorkshire Company were joint owners of the North Union, he had a right to have his coal invoiced through from Hindley to Windermere at the 1d. per ton per mile for the whole distance. Gidlow paid £76 into Court. The case turned upon the Acts of Parliament of the North Union Railway and the transfer of it to the two Companies. The case was tried in the Court of Exchequer, re-tried in Court of Exchequer Chamber, and now came on appeal before the House of Lords, when Lord Selborne (Lord Chancellor) said—"I think there is no ground for the contention that the two declarations make two contracts with two distinct companies, and that the case is as if the goods might remain for any time at Wigan, and as if the ulterior transmission of the goods from Wigan had been left to be determined by a subsequent and independent contract. The powers to levy tolls (9 & 10 Vic., cap. 231) and make charges in respect of conveyance on the railway beyond Wigan are joint powers vested in the Lancashire and Yorkshire Company and the London and North Western Company, and it is for the joint benefit of both that all these tolls and charges are to be collected and paid. In both declarations to the two Companies the ultimate destination of the coal was given as Windermere, and there was no instance of a contract in which Wigan was the ultimate terminus. In the 14th section of the Act it proceeds to say that in calculating the tolls on coal and other things passing as well over the North Union as over or upon one or other of the railways there mentioned (one of which is the Lancashire and Yorkshire), the distances shall in all cases be computed and the tolls imposed as if the two lines formed one line of railway. It appears to me that the appeal fails, and I advise that it be dismissed with costs." Lords Chelmsford, Colonsay, and Cairns concurred. Judgment against Company.—*Tried in House of Lords, May* 11, 1873.—*From Law Journal Reports, vol.* 42, *page* 129.

370. *Wrexham Mold and Connah's Quay Railway Company* v. *Little Mountain Coal Company.*—Action (£701) by Wrexham Mold and Connah's Quay Railway Company against the Little Mountain Coal Company for carriage of coal at 7d. per ton between Buckley and Hope Junction. The Coal Company

refused to pay except at the rate of 3⅞d. per ton, contending that such was the proper rate according to Railway Company's Act of 1862, and the difference, amounting to £363, was the amount in dispute. The Railway Company contended that by section 42 of their Act, as follows, they were entitled to make a special contract over the Parliamentary toll :—

"Nothing in this Act contained shall prevent the Company from taking any increased charges over and above the charges by this Act limited for the conveyance of goods of any description by agreement with the owners of or persons in charge of the goods, either with respect to the conveyance thereof, except small parcels per passenger trains, or by reason of any other special service performed by the Company in relation thereto."

For some time previous 8d. per ton had been paid; but certain correspondence had taken place between the managers of the two Companies, which the Railway Company contended constituted a special contract for a rate of 7d. per ton.

Justice Denman said—"The 42nd clause is, as is too often the case, inartificially drawn; but, putting the best construction I can upon it, I am of opinion that it is impossible to construe it, without doing violence to the language, except by holding it to empower the Company to agree with any persons willing to make such agreements with them to carry goods at higher charges than those mentioned in section 33. The evidence as to the working of the line and sidings for the accommodation of the traffic in question appears to me to have been of a somewhat unusual onerous character; but I do not think it necessary to enter further upon this question after coming to the opinion I entertain upon the construction of the 42nd section. I am of opinion the Railway Company are entitled to recover the balance claimed, £363." Judgment for Railway Company. — *Tried in Court of Common Pleas, December* 21, 1877.—*From Law Times Reports, vol.* 38, *page* 290.

371. *The Aberdeen Commercial Company and the Aberdeen Lime Company* v. *Great North of Scotland Railway Company.*—Action in respect to an illegal charge, the demand of which amounts to a refusal of reasonable facilities. If a railway company carry traffic, whether they carry as common carriers or in any other character, they are equally bound not to exceed, as expressly empowered, the authorised scale of tolls, and an

intimation to sender that they do not profess to carry certain traffic, or that they are not common carriers of it, is of no avail to entitle them to impose their own rates of charge, regardless of limiting clauses.

The special Act of a railway company enacted that (section 52)—

"They may demand any tolls for the use of their railway not exceeding the following:—

"In respect of the tonnage of all articles conveyed upon the railway, or any part thereof, as follows:—For all dung, compost, and all sorts of manure, per ton per mile 2d.; and if conveyed by carriages belonging to the company, an additional sum per ton per mile of 1d." That (in section 53) "the toll which the company may demand for the use of engines for propelling carriages shall not exceed 1d. per ton for each passenger or animal, or for each ton of goods or other articles." That (in section 55) "it shall not be lawful for the company to charge in respect of the several articles and things hereinafter mentioned conveyed on the railway, or any part thereof, any greater sum, including the charges for the use of the carriages, waggons, or trucks, and for locomotive power and all other charges incidental to such conveyance within the several sums hereinafter mentioned, that is to say, for dung, compost, and all sorts of manure, 2d. per ton per mile," &c.

Upon complaint that such railway company refused to carry dung, compost, phosphates, guano, and all articles of a like nature, and announced that they would, however, at the request of the parties, and upon certain conditions and at agreed rates (but not otherwise), provide waggons or locomotive power, or both, to persons desiring the use of the railways owned, worked, or used by the railway company for the purpose of allowing them to forward any of the above-named articles from or to any of the stations,

Held—That the 55th section had not less reference to tolls demandable from persons using the railway than the 52nd and 53rd sections, and that the 2d. per ton per mile was the maximum total charge which the railway company could demand for any sort of manure conveyed on their railway.

The expression "all sorts of manure" in a toll clause includes all sorts of artificial and natural manures *bonâ fide* forwarded for the purpose of being used as fertilisers.

The railway company provided waggons to traders, who loaded and unloaded on their premises, and who hauled the waggons to and from the station for that purpose at their own

expense. Held—That some remuneration was due to the railway company for their waggons being used elsewhere than on their premises, and that a reasonable sum to be paid to them would be an amount not exceeding 1d. per ton.—*Tried in the Court of Railway Commission, 4th, 5th, and 13th April, 10th May, and 1st June*, 1878.—*From Solicitors' Journal and Reporter, vol.* 22, *page* 839.

(The case of *Chatterly Iron Company* v. *North Stafford*, 3 N. & M., 238, also illustrates the same decision.)

372. *Watkinson* v. *Wrexham Mold and Connah's Quay Railway Company.*—Action in respect to the supply of waggons by the Wrexham Mold and Connah's Quay Railway Company to the Buckley Railway, worked by the former Company, and extending for five miles, from Buckley to the port of Connah's Quay, on the river Dee. This was a special case stated for the opinion of the High Court of Justice by the Railway Commissioners.

The Applicants, by their application, complained that the Respondents had neglected to provide and employ proper and sufficient waggons and other rolling stock for the working and use of the Buckley Railway, and the reception, accommodation, conveyance, and delivery of the traffic thereof; and further, that notwithstanding that the Respondents had refused and neglected to supply waggons for the conveyance of the Applicants' traffic to Connah's Quay, they wrongfully and improperly charged the Applicants, in respect of such traffic, the full maximum toll chargeable in cases in which they provide waggons, and had therefore subjected the traffic of the Applicants to an undue and unreasonable disadvantage. The application was first heard by the Railway Commissioners, who made an order in favour of the Buckley Company. Afterwards, by a decision of the Railway Commissioners, the case was stated for the opinion of the High Court of Justice.

Chief Justice Lord Coleridge said—"I am clearly of opinion that the question put to us by the Railway Commissioners must be answered in the affirmative—that the Act of 1873, 35 & 36 Vic., cap. 48, sec. 26, does impose an obligation on the Respondent Railway Company to supply waggons for the

conveyance of the Applicant's traffic upon their railway; that the Buckley Railway is now their railway, and they must supply waggons for the conveyance of the traffic upon that railway. It appears to me to be quite clear that is so under the 18th section. The Buckley Railway is exclusively worked and managed by the Wrexham Company, as lessees of the line under a special Act. The 18th section enacts, in distinct terms, that the 'Wrexham Company so provide, moreover, all such locomotive powers, engines, carriages and waggons, and other rolling stock, as shall be proper and sufficient for the working and user of the demised undertaking, and the reception, accommodation, conveyance, and delivery by the Wrexham Company of the traffic thereof; and the Buckley Company shall not be bound to employ or provide any such person or any such thing.' It appears to me clear that that imposes a duty upon the Wrexham Company to provide waggons necessary, proper, and sufficient for the working and user of the demised railway.

"It appears this dispute has arisen in consequence of the Railway Company having, as I think, put an erroneous construction upon the Act of 1860. They charge, in fact, tolls for the supply of carriages, which they were only justified in charging if they had supplied the carriages."

Judgment of Railway Commissioners affirmed against the Wrexham Railway Company.—*Tried in the High Court of Justice, March* 20, 1879.—*From the Solicitors' Journal and Reporter, vol.* 23, *page* 801.

373. *Pryce* v. *Monmouthshire Railway and Canal Company.*—Action for £671. This amount consisted of a portion of a large account for the mileage carriage of coal, which Plaintiff refused to pay. The coal was carried two miles, three quarters, and 116 yards, and Plaintiff declined to pay *pro rata* for the odd three quarters of a mile and 116 yards, alleging that the Company's Act only empowered them to charge "per ton per mile," and there was no Parliamentary power to charge for any less distance than a mile.

The case was tried in the Court of Exchequer and Court of Appeal, when the Judgment was in favour of the Company in both Courts. Plaintiff then appealed to the House of Lords.

Lord Cairns (Lord Chancellor) said—"It appears to me that unless the right to require payment (of tolls) for a part is excluded (in the Act) by words which are reasonably free from doubt, it must be assumed that it has not been excluded. It would be foreign to the whole object of such clauses to require that the Company should carry merchandise for a part of a mile, not for a sum limited in amount, but for no sum whatever. The words of the section point, as it seems to me, to a rateable charge, rateable *quoad* the ton and rateable *quoad* the mile. I think the decision of the Court of Appeal is right, and this appeal should be dismissed."

Lord Penzance dissented, and thought the appeal should be allowed, and the Judgment of the Court below reversed. In *Stockton Railway Company* v. *Barrett* (7 M. & G., 879; 11 Cl. & F., 590) Lord Brougham said that in doubtful cases you must always lean against the construction which imposed a burden upon the subject, and that the intention of the Legislature to impose a tax must be clear. The like law was laid down in *Gildart* v. *Gladstone* (11 East, 675), where Lord Ellenborough said—"If the words would fairly admit of different meanings, it would be right to adopt that which would be more favourable to the interests of the public and against that of the Company, because the Company bargaining with the public ought to take care to express distinctly what payments they were to receive, and the public ought not to be charged unless it be clear that it was so intended."

Lord O'Hagan also dissented, and said if after the words (in the Act) "per ton per mile, not exceeding three farthings," the words "and so in proportion" had been introduced, the controverted right would have been beyond dispute.

Lord Selborne concurred with the Lord Chancellor, so that the Judges were equally divided, and in consequence the previous Judgment stood in favour of the Company.—*Tried in House of Lords, November 5 and 6, 1878, and April 7, 1879.—From Law Times Reports, vol. 40, page 630.*

374. *Brown* v. *Great Western Railway Company.*—Action in respect to tolls. It was held that the Great Western Railway Company are entitled to charge only a penny

per mile and the 5 per cent. Government duty for the conveyance of third class passengers by ordinary trains. The Company can make this charge for the journey from Paddington to Bristol, about 118½ miles, although there is not, as required by the special Act of 1835, a milestone at the 118th mile, nor at the quarter of a mile beyond it; and the Company may charge for a fraction of a mile as a mile.

The special Act of 1837, enabling the Company to charge 2s. for the journey of five and a half miles from Paddington to Acton, is overridden by the special Act of 1847. Decision of Queen's Bench Division affirmed.—*Tried in Court of Appeal, May* 15, 1882.—*From Weekly Reporter, vol.* 30, *page* 671.

PACKED PARCELS.

	Case No.		Case No.
Pickford v. *Grand Junction* (1842)	375	*Piddington* v. *S. E.* (1858)... ...	383
Crouch v. *L. & N. W.* (1849) ...	376	*Crouch* v. *Great Western* (1858)	384
Crouch v. *L. & N. W.* (1852) ...	377	*Garton* v. *B. & E.* (1859)	385
Parker v. *Great Western* (1852)	378	*Branley* v. *South Eastern* (1862)	386
Crouch v. *Great Northern* (1854)	379	*Sutton* v. *Great Western* (1865)...	387
Crouch v. *L. & N. W.* (1854) ...	380	*Sutton* v. *South Eastern* (1869)...	387
Crouch v. *Great Northern* (1856)	381	*Sutton* v. *L. & S. W.* (1877) ...	388
Baxendale v. *E. C.* (1858)	382		

In my search after legal decisions in respect to traffic conveyed by common carriers, I have met with some sixteen cases of what are known as "packed parcel" cases. I had intended to have excluded these, seeing that the law has long been settled, but I find I cannot do so advisedly, for collaterally they contain the germ of other decisions quite apart from being decisions in respect to packed parcels. The railway companies were beaten on this question in many hardly-contested fights from 1842 to 1869, until at last they gave up the contest as hopeless. That mysterious doctrine of "undue preference" pervaded the whole struggle, and in the end gave the *coup de grâce* to the companies. This "undue preference" is a kind of *ignis fatuus*, a will-o'-the-wisp, here, there, and everywhere. Now it is away, and you hope it is gone for ever; but anon an ingenious counsel or a discriminating Judge throws its flickering twinkle across your hitherto prospering case, you smile a ghastly smile, and realise at once that you are undone. Its presence pervades so largely the Railway Commission Court that it may be said to give life, if not cheerfulness, to that institution. But although it may give the life in a sense, it can hardly be said to illuminate the Court, but rather to give to it a ponderous solemnity, alike melancholy and dispiriting. We know something of

its beginning, but where "undue preference" may end in the alleged interests of the public it would be difficult to prognosticate. It bids fair to grow into a giant that may some day eat up the railways of this country for tiffin. In fact, it is everywhere. When it was confined to the Common Law Courts, it may be said to have flickered within bounds on its own bog, with an occasional dance in the House of Lords; but since the days of the Railway Commission it is as if all the will-o'-the-wisps of all the bogs of the United Kingdom had become amalgamated into an electric light, jumping so irrationally at times that railway directors and managers may yet have to resort to the use of smoked glass to preserve their eyesight.

The first action I can trace where the "packed parcel" question arose was tried in the Court of Exchequer, July 7, 1842, between Pickford & Co. and the Grand Junction Railway Company. This was evidently a test case, for a hamper of different classes of goods, made up as packed parcels, was consigned from Manchester to Birmingham, and a similar hamper consigned from Birmingham to Manchester. The hampers weighed 6 cwt. 2 qrs. 10 lbs. and 8 cwt. 3 qrs. respectively, and at the same time a Manchester pack, 7 cwt. 2 qrs. 17 lbs., being an intermediate weight between the two hampers, was consigned. The Company demanded a rate of 1d. per lb. on the hampers of packed parcels, which was refused, but charged the pack at the class rate. The Judgment was against the Company.—*Meeson and Welsby's Reports, vol.* 10, *page* 399.

The principle having been established, it would seem to have soon become known among the carriers, for, about eighteen months afterwards, Mr. Parker (1844) took the Great Western Company into the Court of Exchequer for undue preference in that, when he delivered several parcels, consigned to different individuals, the Company charged them separately, whereas for the public the weight was aggregated and

charged at the tonnage rate. The Judgment was against the Company, and it was held that the Company's Acts of Parliament are to be construed strictly against the parties obtaining them, and liberally in favour of the public.

In 1849 Mr. Crouch appeared in the legal arena, bringing the London and North Western Company before the Warwick Assizes for that, during transit of a hamper of packed parcels, one parcel was abstracted and lost, and the hamper was overcharged. The Company were beaten, and had to pay for the parcel and refund the overcharge; and it was held that a railway company has no right to open a parcel to ascertain whether it contains other parcels addressed to other persons, being in the same position as the Post Office authorities, who have not the power of opening letters which may contain other letters within them, by which a certain amount of postage may be saved if they are not above a certain weight.

In 1851 a Mr. Edwards gained a victory in the Court of Common Pleas over the Great Western Company. The point of this case was—the Company had issued a classification of goods, which at the end contained "Miscellaneous Class," comprising goods, not being aggregate, of one *class* or *kind*, and for this class of goods a higher tonnage rate was exacted. This classification of course caught the "packed parcels," but the Court held that the Company were not justified in charging under the "Miscellaneous Class" goods that were aggregate of several *kinds*, but all contained in one *class*.—*Manning, Grainger, and Scott's Reports, vol.* 11, *page* 588.

In 1852 the indefatigable Mr. Crouch again came to the front. The London and North Western Company gave Mr. Crouch notice that unless the addresses on the "enclosed" parcels and their contents were declared the Company would not carry the packages. The Company contended in Court they were not *common carriers* of packed parcels. The Judgment, however, was against the Company.—*Law Journal Reports, vol.* 21, *page* 207.

In the same year (1852) Mr. Parker brought the Great Western Railway Company into the Court of Common Pleas for overcharges on packed parcels during the previous four years, such "packed parcels" being sent from London to the West of England. The Company charged Mr. Parker 50 per cent. over the ordinary rate. The Judge said—"The Company's Act enacts expressly that the charge shall be equal to all the public under the same circumstances; and it is admitted there is no distinction or difference, from Plaintiff being a carrier, between him and the rest of the public." Judgment against the Company.—*Law Journal Reports, vol.* 21, *page* 57.

In 1854 Mr. Crouch brought an action against the Great Northern Railway Company for opening his packages of packed parcels and charging each parcel separately at the parcels rates. On appeal, it was held that in accordance with *Parker* v. *Great Western*, also *Edwards* v. *Great Western*, this charging of carriage was not "charges made under like circumstances" to the rest of the public. The Company were defeated.—*Law Journal Reports, vol.* 23, *page* 148.

The next phase was also in 1854, when Mr. Crouch's grievance against the London and North Western Company was that packages of packed parcels, London to Sheffield, and to Glasgow, were refused to be booked through as heretofore, and that being booked only to Rugby in one instance, and Preston in the other, led to delay and excess of charges, the local rates added being in excess of the through rates. Chief Justice Jervis held that as the Company carried tradesmen's "enclosures" booked through, they were carriers of packed parcels at through rates for the public; and as they held themselves out to carry beyond the realm to Glasgow, they were common carriers to Glasgow. Judgment against the Company.—*Law Journal Reports, vol.* 23, *page* 73.

In 1856, another two years afterwards, the contest was again resumed between Mr. Crouch and the Great Northern Railway Company. The Company, by their

Act 9 & 10 Vic., cap. 71, sec. 205, had it enacted that it should not be lawful to include in one package several parcels intended for various individuals. This clause, however, was afterwards repealed by 13 & 14 Vic., cap. 61, and thus the Company's power was taken away. Witnesses from Messrs. De la Rue, Morrison & Co., Darton & Harvey, and other large houses, proved that it was a common practice for their customers to order parcels to be sent as "enclosures;" that is, several parcels for different tradesmen in the one town were sent to one tradesman who was getting the largest quantity of goods, and he distributed them to his neighbours. It was admitted there was no proof that the Company were not aware of the practice. It was held, on appeal in Exchequer Court, that "packed parcels" made up by a carrier for his own profit are not different from enclosures sent by a merchant to one customer to be distributed to several other customers in the same town. Thus the Company were again defeated.—*Law Journal Reports*, *vol.* 25, *page* 137.

Two years passed until 1858, when Pickford & Co. and the Eastern Counties Railway were fighting the old question. Here, as the Judge said, was an attempt to go a step further than ever had been gone before. Pickford & Co. desired to club together loose parcels (not contained in a common envelope) and send them, consigned to their agents, at the tonnage rate, each parcel being visibly addressed to its particular consignee. The Court of Common Pleas would not listen to this, and the Company scored a victory.—*Law Journal Reports*, *vol.* 27, *page* 137.

In the same year (1858) a new litigant appeared on the scene, a Mr. Piddington, who had a contest with the South Eastern Railway Company. That Company insisted upon charging Plaintiff double the ordinary charge for packed parcels, claiming under their Act 2 Vic., cap. 42, sec. 17, to be entitled to charge as they liked for goods under 100 lbs. weight. The Judge held that this power was modified by the Company's older Act 6 Will. IV., cap. 75, sec. 133, and gave Judg-

ment against the Company.—*Law Journal Reports, vol.* 27, *page* 295, *C.P.*

The year 1858 seems to have been prolific in packed parcel cases, for Mr. Crouch was again in the field, and gave the Great Western Company a beating. This was the Plymouth case. The Company carried a package of packed parcels, London to Plymouth, and charged 50 per cent. additional to the ordinary rate. Mr. Crouch's agent at Plymouth refused to pay the "To pay" carriage as being excessive, and delivery of the parcel was withheld, and the next morning the package was sent back to London, and Mr. Crouch could never afterwards recover it. The Court decided that the Company, after the refusal, had not held the parcel in Plymouth a reasonable time to enable consignee to reconsider the matter. Justice Crompton dissented, but the Judgment was against the Company.—*Law Journal Reports, vol.* 27, *page* 345.

The year 1859 brought its troubles, for Mr. Garton gained a victory over the Bristol and Exeter Company. Here the Company's tolls had been exceeded by their charging for "packed parcels" fifth class rate with 50 per cent. added, which brought the total charge above the maximum tolls. As a matter of course the Company were beaten.—*Law Journal Reports, vol.* 28, *page* 169.

There was then a lull in the contest until 1862, when Mr. Branley had an action against the South Eastern Company for charging him double the ordinary rates for packed parcels between Boulogne and London. Chief Justice Erle, who was always in favour of the companies, held that the contract having been made outside the realm the Company was not bound to the same extent, and gave Judgment for the Company. This was one of the few victories scored by the companies.—*Law Journal Reports, vol.* 31, *page* 286.

We now come to the year 1869, when the last decisive trial took place, which was between Sutton and the Great Western Company, and which was carried to the House of Lords. The Company insisted upon

charging packed parcels fifth class rate and 50 per cent. added. The large City houses of Morley & Co., Copestake & Moore, Pawson & Co., Morrison & Co., and others, proved sending "enclosures," and Messrs. Copestake & Moore proved they received daily from fifty to one hundred parcels from other houses, and enclosed them in their own packages going to the same town. The case was first tried at the London Sittings, then by appeal to the Exchequer Chamber, where Chief Justice Erle dissented in an elaborate Judgment, but the majority of the Court was against him and in favour of Sutton. The Company then appealed to the House of Lords, who confirmed the decision in favour of Sutton.

In the year 1877 Sutton brought the London and South Western Company into the Exchequer Division, but this was not exactly a packed parcel case. It turned more on the charging for small parcels when the aggregate weight of several were over 1 cwt. or under 1 cwt., the Company in the former case charging the tonnage rate, and in the latter the "smalls" rate. The Judgment was for the Company.—*Law Times Reports, vol.* 37, *page* 158.

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375. *Pickford* v. *Grand Junction Railway Company.* —Action against the Company for refusing to carry. The goods consisted of one hamper of packed parcels, consisting of books, teas, and hardware, 8 cwt. 3 qrs., and one hamper of packed parcels of cotton, linen, and woollen, 6 cwt. 2 qrs. 10 lbs., Manchester to Birmingham and Birmingham to Manchester; also a Manchester pack, 7 cwt. 2 qrs. 17 lbs. The Company demanded a rate of 1d. per lb., and Plaintiffs tendered the tonnage rate, which was refused.

Baron Parke, in giving Judgment, said—"By virtue of 3 Geo. IV., cap. 34, sec. 156, and 4 Will. IV., cap. 55, sec. 19, the Company, in their character of common carriers, are bound to carry for *reasonable* charges if reasonable charges are tendered to them. If all small parcels are united in one large package, and delivered to the carrier in that package, consigned to one

person, the trouble and responsibility are apparently reduced precisely to the same degree as if all the articles contained in the package were the property of the same owner and intended to be delivered to him. There would seem, therefore, to be no right to charge for such package of distinct parcels belonging to different owners more than if they belonged to the same. It is said that in the event of a misdelivery the Company would be liable to several actions of trover instead of one, and even in case of loss or damage by neglect each separate owner might maintain an action on the custom of England in respect of his own goods. Actions at trover could be maintained, and it would not be unreasonable to allow additional remuneration on this account, which at all events should be trifling. We have no difficulty in saying that 1d. per lb. is excessive and unjustified by the increase of responsibility from the circumstance of the properties being separate." (The first hamper, at 1d. per lb., would have been £4 1s. 8d., against £1 6s. 6d. at tonnage rate, and the second hamper £3 1s. 6d., against 9s. tonnage rate.)

In respect to the Manchester pack, charged at 65s. per ton, Manchester to London, the Court held the Company could only charge Plaintiffs 55s. if Plaintiffs took delivery of the pack at Camden Town, the same as Chaplin & Horne did, who were paid by the Company 10s. per ton for delivering packs from Camden to consignees in the city of London. Judgment against Company on all issues.—*Tried in Exchequer of Pleas, July* 7, 1842.—*From Meeson and Welsby's Reports, vol.* 10, *page* 399.

376. *Crouch* v. *London and North Western Railway Company.*—Action in respect to packed parcels. The Plaintiff, Crouch, by his agent at Birmingham, received small parcels, and had them put into a hamper addressed to himself at London and sent by London and North Western Railway. These small parcels, which were addressed to different persons, it was the business of the Plaintiff to deliver as addressed. In its transit on the railway a small parcel, addressed to Mr. Kent, was abstracted from the hamper.

Held, in an action by the Plaintiff against the Company for

loss of the parcel—That it was sufficient to prove that it was not in the hamper when delivered to the Plaintiff by the Company, and that it was not necessary to go into evidence to show that the Company had not delivered it to Mr. Kent; and that the amount of damages in such action is the value of the lost parcel, as the Plaintiff would be liable to that amount to the owner of it. A railway company has no right to open a parcel to ascertain whether it contains other parcels addressed to other persons, being in the same position as the Post Office authorities, who have not the power of opening letters which may contain other letters within them, by which a certain amount of postage may be saved if they are not above a certain weight. By the Company's Act 3 Will. IV., cap. 36, sec. 181, the London and North Western Company are to take rates and tolls from all persons alike under the same or similar circumstances. Their ordinary price for carrying a parcel from Birmingham to London was ¼d. per lb. They refused to carry the parcel for the Plaintiff from Birmingham to London unless he paid 1d. per lb., which he did. Held—That he might recover back the excess. Verdict for the Plaintiff: on the first count, damages £9 19s. 6d., the value of the articles lost; on the second count, damages £39, the value of the article stolen by the Company's servants; on the third count, damages 4s. 10d., the difference between 6s. 8d., which the Plaintiff was obliged to pay, and 1s. 10d., which would have been the reasonable charge.—*Tried at the Warwick Assizes, before Lord Chief Justice Wilde, March* 30, 1849.—*From Carrington and Kirwan's Reports, vol.* 2, *page* 789.

377. *Crouch* v. *London and North Western Railway Company.*—Action for loss of a package containing "packed parcels," Liverpool to London. The Company contended they gave Plaintiff notice they would not carry any package containing several parcels collected from different parties, and addressed to and intended for several different parties, although enclosed in one package and addressed to one party, unless the addresses on the enclosed parcels and their contents were declared; further, that the Defendants would not be responsible for any such package or the contents unless such declaration

should be made and the particulars declared, and that the Defendants carried on their business on the terms contained in the said notice; that in the present case such declaration was not made. The Company contended that the package was not delivered to them and received by them as common carriers. Judgment was given for the Plaintiff.—*Tried in Court of Exchequer, Nov.* 28, 1852.—*From Law Journal Reports, vol.* 21, *page* 207.

378. *Parker* v. *Great Western Railway Company.*—Action, under eight counts, for money had and received (overcharges), illegally charged to Plaintiff by the Company. The alleged overcharges ranged over the period from January 10th to September 13th, 1848. The case principally turned on the Parliamentary power in the Company's special Acts. The chief grievance between the two contending parties was the "packed parcel" question. Plaintiff was a common carrier, having his place of business at the New Inn, London, and he was in the habit of carrying goods for hire thence to places in the West of England, employing the Company for that purpose. He performed the cartage, collection, and delivery himself at the Company's stations. The Company issued and published a set of rates on January 1, 1848, a revised list on 15th June, and a further revised list on 17th July, 1848.

First Claim.—In addition to the rates fixed by the Company's rate bills, they charged Plaintiff a sum for "loading, unloading, covering, and risk of stowage." The Plaintiff never required the Company to load or unload.

Held—That the rate fixed for "conveyance," where the Company acted as "carriers" under their Act 5 & 6 Will. IV., cap. 107, sec. 167, included the above charges, and that sec. 44 of Company's Act 1 & 2 Vic., cap. 92, did not apply to the case where the Company acted as "carriers" in conveying the goods of other persons, but only to cases in which they did not act as "carriers," but performed the duty of loading and unloading for other persons carrying goods in their own waggons on the railway, being requested to so perform it.

Second Claim.—Up to a certain time the Company allowed 10 per cent. to Plaintiff and other carriers for weighing and

classifying the goods on a particular form of consignment note, whereby they were more readily received, checked, and loaded. The same form of notes was not required from persons not being carriers.

Held—That the requiring of such additional matter from carriers without allowance did not entitle them to an action for money had and received as for an overcharge to them as compared with the rest of the public, in violation of the Company's Act 5 & 6 Will. IV., cap. 107, sec. 175, but that it was the subject of an action for damages for any injury sustained in consequence.

Third Claim.—The Company made an agreement with a Mr. Sherman, a carrier, giving him £1,000 a year for conveying goods to and from their stations, he to relinquish 2d. per package booking fees. "Thus you charge the public, through Mr. Sherman, 19s. 10d., while you charge me 20s., because I have to pay you the 2d. in addition which the public pay me. Now these are not equal terms between me and Mr. Sherman and those with whom we deal."

Held—That, assuming the practice of booking without fees by Mr. Sherman, this was no violation of the proviso in section 175 of Company's Act (the usual clause as to equal rates), the Plaintiff not being bound to charge anything for booking, but doing it merely for his own benefit.

Fourth Claim.—The Company charged the Plaintiff and other carriers 50 per cent. more for "packed parcels" than they charged the public in general.

The section 171 of the Company's Act (5 & 6 Will. IV., cap. 107) is as follows:—

"That it shall be lawful for the said Company from time to time to make such orders for fixing and by such orders *to fix the sum to be charged by the said Company in respect of small parcels* (not exceeding 500 lbs. weight each) as to them shall seem proper: provided always that the provisions hereinbefore contained shall *not extend to articles, matters, or things sent in large aggregate quantities*, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only *to single parcels unconnected with parcels of a like nature* which may be sent upon the railway at the same time."

The Judge said—"The overcharge sought to be recovered in the fourth claim is admitted not to be sustainable on behalf of the Company, because it is a charge which they have made

of an extra 50 per cent. in respect of "packed packages," which, as appears upon the facts found by the arbitrator, is not a charge made upon the public. It is admitted, if that be so, Plaintiff is entitled to recover, because not only is it necessary under the 175th section (of the Company's old Act of Parliament), but the 50th section of the Company's Act 7 & 8 Vic., cap. 3, enacts expressly that the charge shall be equal to all the public under the same circumstances; and it is admitted there is no distinction or difference, from Plaintiff being a carrier, between him and the rest of the public. Therefore, the charge being to Plaintiff 50 per cent. more than to the public, he is entitled to recover that overcharge."

Claims 5, 6, 7, and 8 are not of sufficient interest to extend this report.—*Tried in the Court of Common Pleas, Hilary Term*, 1852.—*Law Journal Reports, vol.* 21, *page* 57.

379. *Crouch* v. *Great Northern Railway Company.*—Action in respect of undue preference in charging "packed parcels." Plaintiff complained that some of his packages had been opened and part of the contents removed whilst they were in the custody of the Company, and for others larger sums had been charged for carriage than were charged to the rest of the public under similar circumstances. By the Company's Act, 14th section of the 13 & 14 Vic., cap. 61, the Company contended they were empowered to demand for any parcel not exceeding 500 lbs any sum they might think fit, provided always that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, or the like, should not be deemed small parcels, but such term should apply only to single parcels in separate packages. The case was first tried at the Yorkshire Summer Assizes, before Justice Erle, and a verdict was entered for the Company. Plaintiff appealed, and on the appeal case Plaintiff contended that the decisions in the cases of *Parker* v. *Great Western Railway* and *Edwards* v. *Great Western Railway* controlled this case, and that these cases had not been brought under the notice of the Judge; that the Company's Act (14th section) was restrained by the 90th section of the Railway Clauses Act. Baron Parke said—"There must be a Judgment for Plaintiff. It seems to me to be im

possible to distinguish the 90th section of the Railway Clauses Act from the 50th section of the 7 & 8 Vic., cap. 3 (Great Western Company's Act), upon which the decision of the Court of Common Pleas was founded in *Parker's* and *Edwards' Cases.* That governs the present case." Barons Platt, Alderson, and Martin concurred. Judgment against Company.—*Tried in Court of Exchequer, February* 2, 1854.—*From Law Journal Reports, vol.* 23, *page* 148.

380. *Crouch* v. *London and North Western Railway Company.*—Action against the Company, that they should, as common carriers, accept packages containing "packed parcels," and book same beyond the termini of their own line to towns on other railways to which they were in the habit of carrying. On the 21st October, 1850, Plaintiff delivered at the Euston Station a package, 18 lbs. (containing two parcels), for Sheffield, to go by mail train. He tendered the usual carriage, 2s. 5d. The Company, on its being acknowledged to be a packed parcel, refused to book it beyond Rugby, the termini of their line. It was so booked to Rugby, and 1s. 2d. carriage paid. The parcel, on being handed over to the Midland Company at Rugby, lost a train, and instead of reaching Sheffield at 4.15 a.m., it did not arrive until 11.55 a.m. The charge, Rugby to Sheffield, was 1s. 6d., making the two locals added 2s. 8d., whereas the through charge was 2s. 5d. A second case of a similar nature occurred with a package of five packed parcels, London to Glasgow, which was delayed at Preston for transfer; but the two local rates in this case did not exceed the through charge. In another case, the Company refused packages acknowledged to contain packed parcels because the contents or goods in the parcels were not declared. Plaintiff contended that packages and parcels outwardly similar to his were booked through at a through charge, and carried in a through van. The Company contended (1) they are not common carriers indiscriminately; (2) that they are common carriers to the extent of their own line only, and carry beyond only by special contract; (3) that, at all events, they are common carriers only to the extent of their own line with respect to packed parcels; (4) that Glasgow is beyond the realm, and the Company cannot be common carriers and bound to carry London to Glasgow.

Chief Justice Jervis gave the Judgment of the Court. He said—"No doubt the evidence goes to show the Company are carriers of packed parcels beyond their own line. The measure of their liability is their profession, and they say they will not carry packed parcels beyond Rugby. Their practice, however, is to carry packed parcels (tradesmen's enclosures) beyond Rugby for ninety-nine people and to refuse for the hundredth. I am of opinion that the Plaintiff is entitled to our Judgment. The effect of the 86th, 87th, and 89th sections of Railway Clauses Act is to put the Company on the footing of common carriers. I think that, holding themselves out as common carriers in England, and professing to carry London to Glasgow, they are liable for refusing to accept goods for Glasgow. If a person holds himself out as a common carrier, say London to Oxford, he is bound to carry within reasonable limits all goods that may be tendered to him in London for Oxford. If the Company had accepted the goods in London, the common law would have engrafted on their contract an obligation to carry to Glasgow as an insurer, excepting the acts of God and the King's enemies." The Judge held in like manner the Company were common carriers to Sheffield. "They are common carriers, and must adopt the same course of practice to all; and it being found in the case that it was their habit to carry packed parcels for everybody but the Plaintiff, they must act with the same justice to him as to the rest of the world.

"No authority has been cited to show that a carrier is entitled in every case to know the nature and quality of the goods tendered to him to be carried, and on looking at the other provisions of the Act of Parliament, there seems to be no reason why the Company should make the inquiry. With reference to dangerous articles, they are entitled by the Act to know the nature and quality, and such must be discovered to them at the time of the delivery; and if the Company suspect articles to be of a dangerous nature they may open the packages. So, with respect to goods of a peculiar value, provision is made by the Act, if the value is not disclosed at the time of the delivery, and payment in the nature of an insurance made accordingly, the liability of the carrier is

limited, and the consignee, in the event of loss or damage, cannot, by reason of the concealment, recover the full value. In these respects, therefore, the carrier is protected by law, and even if it be reasonable under certain circumstances that he should be informed of the contents of the parcel, the plea should have stated that there was a reason on this occasion for requiring the information. It is not alleged in the plea that there was a reason. The plea is founded on a general proposition that in the case of all goods, of whatsoever nature or quality, sent to a common carrier, the person delivering them is bound to know and be able to state, if required, their nature and quality. Now I think if that be so the consequences would be so highly inconvenient that we should require authority to support it." Justices Maule, Cresswell, and Williams concurred.—*Tried in the Court of Common Pleas, January* 17, 1854.—*From Law Journal Reports, vol.* 23, *page* 73.

381.—*Crouch* v. *Great Northern Railway Company.*—Action for injury to business by a "packed parcel" carrier owing to the Company charging his goods at an excessive rate, and in some cases refusing to carry his packages—(1) A case delivered to be forwarded, London to Leeds, by the next mail train after delivery was not so forwarded, but was unreasonably delayed; (2) that the Company had failed to deliver a package containing five parcels consigned London to Leeds; (3, 4, 5, and 6 counts) that the Company had refused to receive and forward different packages; (7) loss of business from this conduct; (8) conversion of goods by the Company. The Company denied generally the various charges, and contended they were empowered to make their own charge on packages under 500 lbs., and that their refusal to carry was owing to Plaintiff refusing to inform them whether or not the packages contained "packed parcels," which they required to know to make the proper charge for same. Plaintiff alleged the Company made an order directing their servants to charge for packed parcels at five times the rate of ordinary parcels, and by a further order they directed that Plaintiff's parcels and all other suspected parcels should be treated thus—The Company's servants were to ask if the parcel was a "packed parcel;" if the packing were admitted,

the higher rate was to be charged; if the packing were denied, they were to refuse to take it unless proof of the non-packing were given. It appeared that by the 205th section of the Company's Act (9 & 10 Vic., cap. 71) it was enacted that it should not be lawful to include in one package several parcels intended for various individuals. This clause was afterwards repealed by the 13 & 14 Vic., cap. 61, being an Act to amend the laws relating to the Great Northern Railway. This amendment introduced the usual clause relating to weights of 500 lbs., which clause seems to be common to the Acts of all the companies. In one case a package was charged the high rate, and consignee (Plaintiff's agent) refused to pay, and the Company retained the package. Witnesses from Messrs. De la Rue, Messrs. Morrison & Co., and Messrs. Darton & Harvey and others were heard, who proved it was a common practice for their customers to order parcels to be sent as "enclosures;" that is, several parcels for different tradesmen in the one town were sent to one tradesman who was getting the largest quantity of goods, and he distributed them to his neighbours. It was admitted there was no proof the Company were not aware of the practice. The first trial took place at the London Sittings after Hilary Term, 1855, before Baron Martin, who left to the Jury whether there was any difference, in their judgment, between "packed parcels" and "enclosures." The Jury were of opinion there was no difference between the two, and that the charge made by the Company was not equal. Thus they found for Plaintiff, with £200 damages for injury to his trade. The Company appealed against this verdict, and on the appeal case Chief Baron Pollock decided the verdict of the Jury must stand, except the damages, which the Court reduced to 40s. Baron Martin, who had tried the case first, in a lengthy Judgment traced the law and the cases decided in respect to "packed parcels," and quoted the first case, *Pickford* v. *Grand Junction Railway* (10 L.J.R., 342 Ex.), which was a case prepared by the parties to test the law; the strongest point that could be made for the Company was that in the event of a "packed parcel" package being lost they would be liable to be sued separately by each owner of each parcel. Baron Martin expressed the opinion that for misdelivery or conversion there could not be two

actions on the one contract; but "if a carrier cuts open a package and takes a parcel out, and converts the goods to his own use, he puts aside his duty as a carrier. He is then in the position of a man who is dealing with another man's goods, and if a man will deal with a quantity of goods in an illegal way, by destroying them or consuming them, he is responsible to *every person* whose goods he deals with. Thus there might be a second action, but it would be an action for the destruction of the parcel, wholly independent of and beside the duty of a carrier. In the next case, of *Parker* v. *Great Western Railway* (21 L.J.R., 57 C.P.), Chief Justice Tindal said there was no distinction whatever between carriers and other people as far as their dealings with the railway. Justice Maule says most distinctly that there is no difference whatever in his mind between a package sent to a man containing parcels belonging to a variety of other people and packages sent to a man of which all the contents are his own." The case of *Edwards* v. *Great Western Railway* (21 L.J.R., 72 C.P.) followed in like manner against the Company. Then came the case of *Crouch* v. *Great Northern Railway* (23 L.J.R., 148 Ex.), same parties as in the present case, when the Judgment was against the Company. Baron Martin said—"If a man in London makes a business of collecting parcels for a variety of persons, say in Leeds, and sends them there to his agent to distribute, that is a 'packed parcel.' Now, suppose a parcel was made up by a person in London of the same identical articles, and was sent to Leeds to a consignee to whom they all belonged, would the carrier be justified in charging a higher rate for the first package than for the second package? According to the argument of counsel, if senders in each case admitted the circumstances, the Company would be justified in asking 5s. for carrying the first and 1s. for carrying the second. You are to carry this parcel to A. in Leeds and the other to B. in Leeds. It is true, when the parcel gets to A., he will open it and send his boy to deliver twelve parcels to twelve different people in the town. When the other parcel gets to B., he will tell his boy to put the different parcels on the different shelves in his shop. But you, the carrier, have nothing to do with that. You are asked to deal with a parcel

of the same weight and the same value; what business is it of yours how the party deals with it in Leeds? An ordinary person, a man not in the law, would say he could not see the difference between carrying the two packages, of identically the same weight, to the same town, to be dealt with in the same way; or why an extra charge should be made by persons who are *under an obligation to carry equally for all.* I am of opinion there is no difference between a 'parcel' packed and an 'enclosure.' Inasmuch as the Company, by their own admission, acted differently towards the Plaintiff in respect to what they call a package of packed 'parcels' and other packages, the question upon the 14th section of the Company's Act does not arise. The Railway Company prevailed on a Committee of the House of Lords to insert a clause giving them a monopoly in the carrying of small parcels, but there is no ground to suppose that the Legislature formed any judgment upon the distinction to be drawn between 'packed parcels' and 'enclosures.'" Baron Alderson concurred. Judgment against Company, with damages reduced to 40s.—*Tried in Court of Exchequer, January* 13 *and* 15, 1856.—*From Law Journal Reports, vol.* 25, *page* 137.

382. *Baxendale* v. *Eastern Counties Railway Company.*—Action for £26 9s. 5d., alleged overcharge upon parcels between London and Norwich during September, October, and November, 1856. The parcels were under 1 cwt. each, and were delivered loose. When several parcels were from one sender and for one consignee, these were weighed together, and, if over 1 cwt., were charged at the tonnage rate. Plaintiffs claimed that parcels should be clubbed together, and the tonnage rate charged when the parcels were even from different senders and to different consignees. Plaintiffs (Pickford & Co.) were common carriers, using the railway for their customers, and carting to and from the two stations. Justice Byles said—"I am very glad in this case the Court has been able to decide the point without putting the parties to the expense of appearing before a Jury. It has been decided long ago, with respect to packed parcels, that if they are in a common envelope they are to be charged at the lower or tonnage rate; and it is admitted

in this case, and it is the practice of the Railway Company, if there are loose parcels directed by a common direction by one sender in Norwich to one consignee in London, that that is sufficient to subject them also to the smaller charge (tonnage rate), and nothing more. But this is an attempt to go a step further than has ever been gone before. This is a case not only of loose parcels, with no common mark or distinction upon the face of the parcels to enable persons to discriminate between them and any other parcels; and it is manifest that that may, to say the least of it, impose upon the Railway Company additional trouble. It is clear the circumstances are not alike. Then it surely lies upon the party who says that the charge ought to be alike to show that the difference in the charge is unreasonable. There is nothing here to show that the difference is unreasonable, and the onus must lie upon the party who asserts that it is unreasonable. The Plaintiffs sue here for a specified sum of money. In order to have the Judgment of the Court in their favour, the Court must be able to say what is a reasonable sum; they must be able to fix a smaller sum—a sum to be subtracted, as well as the sum from which the subtraction is to be made—which is clearly a thing the Court cannot do. We see clearly that there is a difference which may necessitate an increased charge, and we cannot say that the charge which is made is unreasonable, both of which we must say before the Plaintiffs can be entitled to recover." Justices Williams, Crowder, and Willes concurred. Judgment for Company.—*Tried in Court of Common Pleas, February* 11, 1858.—*From Law Journal Reports, vol.* 27, *page* 137.

383. *Piddington* v. *South Eastern Railway Company.*—Action for £95 13s. 3d., overcharges between the 1st August and 30th November, 1857, on packed parcels. These goods consisted of closed packages containing small parcels of different descriptions, and in respect of these the Company claimed to be entitled to charge double the sums charged for parcels not packed of the same weight. The case was first tried at the Westminster Sittings, Easter term, before Justice Williams. It was left to the Jury to say whether there was any increased risk in the carriage of the parcels when so packed, and they

found there was none. Verdict for Plaintiff for full amount. The Company appealed, and on the new trial contended that the Company's Act 6 Will. IV., cap. 75, sec. 133, and the Company's Act 2 Vic., cap. 42, sec. 17, entitles them to charge as they like for goods under 100 lbs. Justice Williams, in giving Judgment, said—"I think it is a strong thing to contend that section 133 entitles the Company to charge as they like for goods, provided the packages do not exceed 100 lbs. each. I think this question is governed by the Company's later Act, 2 Vic., sec. 17, read together with section 133 of the first Act. I am of opinion, with respect to the charges, that they are made by the Company in violation of this provision of the 17th section. I think the Plaintiff is entitled to recover the sum overcharged him."

Justice Willes said—"The question is whether the Company can charge for parcels tied together or packed together in paper, or otherwise, at double the rate that they would charge for them if they were separate. If the charge, when the parcel is single, is 5s., can they charge 10s. when the same weight is made up of separate parcels packed in a single package or hamper? Now, if they have absolute power to charge at will for parcels under 100 lbs., they can no doubt charge double; but if they are bound to charge what is reasonable, they cannot make such a charge. In *Pickford* v. *Grand Junction Railway* the Court of Exchequer held, in a similar case, such was not reasonable. The result that more than one action might be brought against the Company for the loss of a single package containing many parcels may be very inconvenient, but it is wholly a matter of speculation. By 133rd section of the Company's Act their charges must be reasonable. The 17th section of the Company's other Act prescribes, in express terms, that the charges shall be made after the same rate on all goods 'of a like description,' and the fact of the tying or packing the goods in a hamper does not make them cease to be goods of a like description. It is clear the charge is made for the purpose of preventing carriers from competing with the Company, but that has been held, over and over again, Railway Companies in general cannot do." Justice Byles concurred. Judgment against Company.—*Tried in the Court of Common Pleas, June* 21, 1858.—*From Law Journal Reports, vol.* 27, *page* 295, *C.P.*

384. *Crouch* v. *Great Western Railway Company.*—Action for value of a package of "packed parcels," London to Plymouth. The case turned on the refusal of the package by consignee and its return to London. The refusal arose from the Company charging the package 2s. 3d., or 50 per cent. over the ordinary charge, because it contained packed parcels. Consignee agreed to pay 1s. 6d., the ordinary charge. Plaintiff had applied for the parcel at Paddington Station and could not get it, and it was never found, and Plaintiff had to pay his customers for the enclosed parcels. The case was first tried at the London Hilary Sittings. The Jury, in answer to questions left to them by the Lord Chief Baron, found that the tender of the 2s. 3d. to the Company on the day after the refusal (but after the package had been sent back) was made within a reasonable time of the first offer and refusal, and that the package was sent back to London before a reasonable time had elapsed, and also that the package ought not to have been sent back to London. Judgment against Company.

The Company appealed to the Court of Exchequer, and Barons Channell and Martin and the Lord Chief Baron held that the decision in the Court below was correct and must stand, and they being in the majority, the Judgment was affirmed. Baron Bramwell, however, dissented, and said—"The Plaintiff should have paid (the 2s. 3d.) under protest and sued to recover it. But if he declines to take that course, by which he might obtain the goods instantly and retain his remedy for any overcharge, he cannot refuse to receive the goods on that ground and then sue the Company for not delivering them. In this action it must be taken that the charge was proper. It seems to me that these findings by the Jury are unmeaning, and that the Company had a right to return the package to London and hold it there, to secure their lien, on the peremptory and absolute refusal of Reynolds to pay for its carriage. The Company undertook the whole carriage to Plymouth, but the South Devon Company had clearly a right to return the parcel to the Great Western Company and demand their charges, and of course to return the package and debit the Great Western Company in account; and the Great Western Company could have no station or place at Plymouth, as it would be *ultra vires*.

The return, therefore, must be to the Great Western Company, and I suppose it will not be said that the parcel might have been kept and warehoused at Bristol, but not at London. I am of opinion the Great Western Company are entitled to Judgment." Judgment, however, was given against the Company.

The Company made a further appeal, and on the appeal trial, in the Exchequer Chamber, Justice] Wightman said—"Upon the facts of this case, as they appeared before us in the argument, I entertain very great doubt whether the Company were guilty of any neglect or breach of duty; but however that may be, it seems to me that, as the case stands upon the pleadings, the issue upon the replication to the third plea is properly found for Crouch. I, however, agree to what I understand to be the opinion of the majority of the Court."

Justice Crompton said—"It was, I think, an unjustifiable act on the part of the Company (as we must now take it, after the finding of the Jury) in an unreasonable time to send the goods to London, which must be taken, after the finding of the Jury, to be an unreasonable place. It may be too much to say that a carrier cannot in any possible case send a parcel back, but certainly it is very much too strong to say that in every case a carrier can send the parcel back to the sender on a refusal to pay the carriage."

Justice Willes said—"But it appears to me that returning the parcel was a breach of the Company's legal duty. When the parcel was refused at the end of the line, they were entitled to retain it in respect of their lien, but they might, if they had chosen, have delivered the parcel, trusting to their action for the recovery of the proper sum for the carriage. They did not think proper to do so, but retained it, and, retaining it, it appears to me they were not entitled to dispose of it as they thought proper themselves. Their duty is to take reasonable care of a parcel, and to deal with it in respect of time and place in a reasonable manner. Keeping it in a reasonable place would impose upon the carrier the duty of keeping it for a reasonable time, if he had the means of doing it, at the place at which it was originally delivered to be carried to."

Justice Williams concurred, resting his opinion entirely on the finding of the Jury.

Justice Crowder differed from the majority of the Court, and said—"The Company duly carried the parcel, and duly offered it for delivery at consignee's place of business at 2 p.m., demanding 2s. 3d., the correct charge for carriage. The parcel was positively refused, whereupon the railway porter retained the parcel, saying it would be returned to London. At 8 a.m. the following morning it was sent back by train from Plymouth to London. About two hours after its departure the parcel was demanded at the railway station at Plymouth by consignee, and 2s. 3d. tendered for the carriage, when the messenger was informed that the parcel had that morning been returned to London. It is urged the Company have failed to perform a portion of their duty in keeping the parcel a reasonable time at Plymouth, which reasonable time the Jury had found had not elapsed prior to the demand and tender of payment by consignee at the Plymouth station. Now it appears to me that the Company's duty as carriers terminated on the refusal of consignee to pay the carriage of the parcel when offered for delivery, such refusal being peremptory, and without any request for delay or intimation of want of time for further consideration. Such refusal amounted to a positive and unqualified refusal to accept the delivery of the parcel. I agree in the opinion expressed by two of the learned Judges in the case of *Storr* v. *Crowley*, that the duty of a carrier terminates on such refusal. I own it is quite a new doctrine to me, and wholly unsupported by authority, that after peremptory refusal to receive the goods tendered, on the payment of the price for the carriage the carrier is bound by law to retain them for a reasonable time, in order to allow an opportunity to the consignee to change his mind and do that which he ought to have done before, but which he had positively refused to do. It is true a carrier has a right to retain the goods by way of a lien for the carriage, and the exercise of that right imposes the duty of taking proper care of them for the owner. But the character of carrier has then terminated, and the duty of a simple warehouseman has commenced, which has very different duties and responsibilities attached to it. The Company in this case, having a lien on the parcel, were bound to take proper care of

it for the sender who delivered it to them, but were, in my opinion, under no legal obligation to keep it at Plymouth or any particular place. Assuming the object of the transport to have altogether failed by consignee's refusal to receive the parcel at Plymouth, the Company might well have supposed the sender would demand restitution of it in London, where he had delivered it to them. Paddington, London, is a convenient place for the Company to keep the parcel. It might have been considered by the Company not inconvenient for the sender. But at all events I see no tortious act in the removal from Plymouth to London. It seems to me, therefore, neither as carriers nor as warehousemen did the Company commit any breach of duty in removing the parcel to London, as it appears they did." Judgment against the Company.—*Tried in Court of Exchequer Chamber, February* 23, 1858.—*From Law Journal Reports, vol.* 27, *page* 345, *Exchequer.*

385. *Garton* v. *Bristol and Exeter Railway Company.*—Action for money had and received, otherwise alleged overcharge on two consignments of "packed parcels," charged fifth class rate, with 50 per cent. added. On January 20, 1858, Plaintiff delivered at Bristol a package, described as a "bale of drapery," for Bridgewater, weighing 7 cwt. 1 qr., upon which he paid, under protest, 6s. 1d. carriage. On January 21 he delivered at Bristol a package, described as a "hamper of manufactured goods," for Bridgewater, weighing 5 cwt. 3 qrs. 6 lbs., and paid, under protest, 7s. 6d. In the latter case the Plaintiff's man admitted to the Company's clerk that the hamper contained "packed parcels." It subsequently was ascertained the hamper contained—

	cwt.	qrs.	lbs.
1 Truss of drapery	1	0	13
1 Box tobacco	0	3	18
1 Bale paper	0	1	16
1 Bale paper	0	2	0
1 Truss drapery	1	0	19
1 Parcel of soft haberdashery and drapery, contents not exactly known	0	0	15
1 Cask spirits	1	0	9

The highest class to which any of these articles belonged is fourth class. The distance between Bristol and Bridgewater is thirty-three miles, and by the Company's Act 8 and 9 Vic., cap. 165, sec. 19, the sum charged for the bale exceeds the maximum sum authorised to be charged for the carrriage of such a parcel by the sum of 1s. 2d.; in like manner with the hamper by the sum of 3s. 6d. The Company contended that their Act quoted by Plaintiff did not apply to their main line, but was an Act confined to certain branch lines and junctions.

Chief Baron Pollock—"I am of opinion Plaintiff is entitled to our verdict." The Judge considered the Company's Act did apply to the whole of the Company's railway. He said —"Assuming section 19 of Company's Act did not apply, were the Company, under all the circumstances, justified in charging the hamper 7s. 6d., or any and what further sum than 5s., the proper sum chargeable for the hamper simply regarded as a parcel of the fifth class? I am of opinion the conduct of the Company in asking questions of common carriers and not of others as to packed parcels is unequal, and that there is no proof of any right to charge more than 5s., and that, upon the whole, our Judgment ought to be for the Plaintiff for 4s. 8d." Barons Martin, Watson, and Channell concurred. Verdict against Company.—*Tried in Court of Exchequer, January* 26, 1859.—*From Law Journal Reports, vol.* 28, *page* 169.

386. *Branley* v. *South Eastern Railway Company.*—Action for £11 19s. 11d. for alleged overcharges arising from packages containing "packed parcels," which were charged double the rate of ordinary parcels, Boulogne to London. Plaintiff relied upon the case of *Piddington* v. *South Eastern Railway Company* to recover for money had and received; that the principle of the case applied equally to the carriage of parcels, Boulogne to London, as from London to Boulogne. The Company contended that the contract was made in France, and by the law there, if the carrier took goods without fixing a price for the service, then, in cases of dispute, he would have to take the price fixed by the tribunal, which would probably be the reasonable price, or according to usage.

Chief Justice Erle—"This is an action to recover back sums

alleged to be overcharges for packed parcels, Boulogne to London. The Company worked under their Acts of 6 Will. IV., cap. 75, as a railway company, and 16 & 17 Vic., cap. 156, for their steamboats. The contract was made at Boulogne under a tariff published there, and known to the Plaintiff. As a general rule, the *lex loci contractus* governs in deciding whether there was illegality in the contract, and, according to the law of France, there was nothing illegal in it. The Company were carriers under no legal restriction, and having capacity to make their contracts as they might think most for their own interests. If the railway legislation could take an extra-territorial effect in France, that question does not arise, as the statute creating the Steam Packet Company leaves that Company free to make any contracts for goods which they may choose. We have no jurisdiction to alter contracts by reference to their equality outside the provisions of the Railway Acts. In my opinion, even if the railway legislation of England applies to contracts in France, the Company are entitled to succeed. The statute of 5 Will. IV., cap. 75, sec. 133, empowered this Company to charge what to them should seem proper in respect of parcels not exceeding 1 cwt. each. Under the 2 Vic., cap. 42, sec. 17, the Company are commanded to charge equally to all persons in respect of all goods of a like description. This command the Company have, in my opinion, obeyed. They have charged equally to all persons for all goods coming under the description of 'packed parcels,' without making any difference between them and parcels called 'enclosures' in former decisions. The Company have a right to divide goods into classes by descriptions appropriate to the different classes it chooses to make. The Company claimed to charge extra to carriers for packed parcels, and not to charge extra to customers not carriers for what they called 'enclosures,' which were in reality packed parcels. The question for the Jury in each of the 'packed parcel' cases was whether one aggregate of small parcels made up by a customer not a carrier was of a like description with the same aggregation made up by a carrier, and the Juries have found that it was; and upon that finding the Courts have held that the extra charge for a packed parcel to a carrier was against the command in the

last-mentioned statute or similar statutes analogous thereto." Justices Willes and Keating concurred. Verdict for Company. —*Tried in the Court of Common Pleas, May* 12, 1862.—*From the Law Journal Reports, vol.* 31, *page* 286.—Quoted in *Law Times* as Bramley, not Branley, vol. 6, page 459.

387. *Sutton* v. *Great Western Railway Company, and Sutton* v. *South Eastern Railway Company.*—Action for £1,000 alleged overcharges on "packed parcels" charged fifth class rate and 50 per cent. added. The following consignment was depended upon to prove the practice. On the 21st December, 1861, Plaintiff (Sutton) who was sender, delivered to the Company at London a hamper, professedly containing "packed parcels," for Bath, weighing 4 cwt. 2 qrs. 20 lbs., and it was charged 42s. 6d. per ton fifth class, with 50 per cent. added, amounting to 14s. 2d. to pay. The packed parcels contained drapery and books. Plaintiff, in evidence, stated he did not know the actual contents of any of the packages he received, but from the business carried on by the senders who delivered them to him, and from the appearance of the packages themselves, he inferred, and the fact was, that the greater part of them were drapery goods; that he also received packages from hosiers, stationers, perfumers, and other tradesmen, and it was his habit to put, indifferently, into one packed parcel all or any of the packages he received which were addressed to the same town, and which were of a suitable weight; that he received parcels for Bath from dealers in drapery and millinery, and that their goods were called "drapery" in the carrying trade, and that the parcels might contain velvet, silks, ribbons, and all kinds of goods of that character. The manager from Morley & Co., Wood Street, London, produced a book in which they entered parcels sent to them from other houses in the City to be enclosed as "enclosures" to various towns to which goods were despatched, and he said that sometimes there were 100 parcels a day so enclosed. Messrs. Morley were not paid for enclosing or distributing the parcels, but were obliged in the same way by other houses. The witness stated Morley & Co. did not declare the contents of their packages on delivering them to the Company, and the Company never asked them the contents.

The Company charged the fourth class rate, but never the 50 per cent. additional. A witness from Copestake & Moore gave similar evidence, stating the firm sent out 700 to 1,000 packages a day, and that 50 to 100 of them were packages containing "enclosures." A witness from Messrs. Pawson & Co. gave similar evidence, saying they despatched 500 to 600 parcels a week, and some contained "enclosures." A witness from Messrs. Morrison & Co. stated the same, saying they forwarded about 1,000 parcels a month with "enclosures." Evidence was also adduced that Maw, the surgical instrument maker, had for thirty years sent "enclosures" in his packages, consisting of "drugs, patent medicines, cigars, and almost everything a country druggist deals in." "The object is that my customers save carriage by it." A Mr. Hugh Lavington, a carrier and carrier's agent for forty years, said—"This practice of packing parcels has been notorious during the whole time of my being in the business." The Company offered no evidence. The case was first tried before Baron Martin at the London Sittings, Guildhall, 4th July, 1864. The Judge directed the Jury that if they believed the Company knowingly and purposely charged the Plaintiff at a higher rate than other persons upon a "packed parcel" of goods *of a like description and under like circumstances*, they ought to find a verdict for Plaintiff. The Jury found a verdict on the issue for the Plaintiff, and the Company brought error on their bill of exceptions. On the appeal, in the Exchequer Chamber, the following Judges—Willes, Blackburn, Byles, Keating, Mellor, and Shee—gave a Judgment for Plaintiff, Chief Justice Erle dissenting. Chief Justice Erle said—"The Company made the exceptions to the rulings which appear on the record, and which raise the question whether the verdict can stand according to law. I am of opinion that it cannot, for the following reasons:—(1) Because the charge of 50 per cent. extra for packed parcels is a parcels charge under section 53 of the 10 & 11 Vic., cap. 226 (Company's Act), authorising charges for parcels at discretion, and is not within the operation of the 7 & 8 Vic., cap. 3, sec. 50 (Company's Act), requiring equality of charge under certain conditions in respect of the charge authorised by that section, and, therefore, is not rendered un-

lawful by reason of the alleged inequality. (2) Because there is no evidence that the Company ever knowingly and purposely charged the Plaintiff at a higher rate for any specific parcel than they charged to some other persons for some parcels of a like description and quantity, delivered under like circumstances; and if there is any evidence that they ever did so in any specific instance, there is no evidence that they did so in a number of instances. (3) Because, if the charge for packing is assumed to be within the operation of the 7 & 8 Vic., cap. 3, sec. 50, there is no evidence that the conditions under which that section is made to operate have been fulfilled; that is to say, there is no evidence that a charge on the goods of the Plaintiff, of the like description and quantity with the goods of some other person, was unequal to the charge on such goods of that other person in respect of the same carriage. (4) Because, if the same assumption be made as lastly mentioned, there is no evidence that such conditions have been fulfilled; that is to say, there is no evidence that the goods of the Plaintiff were delivered under like circumstances with the goods of any of the other persons referred to for comparison by the witnesses. (5) Because no action lies to recover back part of a charge for carriage lawful in itself by reason that the same service of carriage has been done for some other person at a lower charge. (6) Because inadmissible evidence was admitted, and there was a misdirection thereon. The notion that railway companies have a monopoly, and that the evil of this supposed monopoly is mitigated by taking away their earnings and granting them to carriers who have used, or might have used, horse power, seems to me to underlie the administration of the law. It appears to me that the Plaintiff offers to carry parcels at a lower rate than the Company's charge, and when his prices are known, according to ordinary principles he will intercept all the parcels in respect of which his prices are lower than those of the Company. The outlay of the Great Western Railway Company, before a train can start, may be measured by millions of pounds for fixed capital, by hundreds of thousands for rolling stock, and by thousands *per diem* for expenses. There must be receipts enough to indemnify the expenses before profit begins. The whole of the service for which the sender consign-

ing through the Plaintiff pays money to him, namely, the transport of his parcel from station to station, is done by the Great Western, and, although it is confessedly the most lucrative part of their business, yet the gain which they are entitled to under their tariff is taken away from them and given to the intercepting carrier, who has not moved the parcel on the rail one inch, and who may not have invested more capital than the price of a cart in which he may receive parcels for interception. Moreover, the railway companies are met by constant checks if they endeavour to get consignments to themselves direct, whereas the interceptors are at perfect liberty either to undersell the companies, or to give favour to senders, or to obtain custom by any means that rivalry can suggest. The companies have made various attempts to save some portion of this profit to themselves. In the *Grand Junction Case* the attempt was to charge the carrier the parcel price for each parcel in the package, but as the law did not allow the package to be opened for examination, nor compel an answer to questions, this attempt failed. Another attempt of the *Grand Junction* was to charge 1d. per lb., which was there held to be unreasonable, but seems to be clearly reasonable, and is now adopted by the South Eastern, as appears in this record, and is perhaps the best redress now practicable. Another attempt was to charge 50 per cent. on the packed parcel in addition to the price for a common parcel, which is the course pursued by the Great Western, now under judgment. This redress they were held to be deprived of in *Parker's Case* (11 C.B., 545), because they had not done something which it was supposed they ought to have done, whereby they might detect the parcels which have 'enclosures,' and might make the proprietors of such enclosures, when detected, pay the extra price on packed parcels. The attempt of the present Defendants to keep a share of the parcel profit, by charging for packed parcels extra, is now resisted on the ground last above-mentioned. The Company's Act 7 & 8 Vic., cap. 3, sec. 50, authorises the Company to charge for goods either per ton, per mile, or by bulk, number, or admeasurement, or by fixed charges, as they shall think expedient; but there follows a proviso for equality—'Provided always that in whatever way the said charges are made, they shall be made

equally to all persons in respect of "all goods and things of a like description and quantity;" secondly, "conveyed by a like carriage;" thirdly, "passing along the same distance;" and fourthly, "delivered under like circumstances," and "no reduction or advance on any of such charges shall be made partially, either directly or indirectly, in favour of or against any particular person."' If one sender does not declare properly, or makes 'enclosures' to evade payment, and another sender delivers without either of these circumstances, the senders have not delivered under like circumstances. It seems to me unreasonable to hold that the packed parcel of the intercepting carrier and the package enclosing things for two neighbours are of like description, and delivered under like circumstances, in relation to the carrier's interest within the statute, and that the railway companies forfeit their right to charge extra for the packed parcel unless they charge also for the 'enclosure.' I submit that it would be wrong so to hold. Furthermore, as to the two deliveries being under like circumstances, I say that the Company are to be the sole judges whether the circumstances materially differ in their effect on their interest as carriers; and if they judge *bonâ fide* that the circumstances differ, and there is reason for that judgment, the circumstances are not like. The railway companies ought not to be compelled to detect and notice the package of things of a trifling nature, and charge a few pence extra, upon pain, in case of failure so to do, of forfeiting parcel profits, amounting maybe to thousands of pounds, to intercepting carriers who do as they like in this respect. By the Company's Act 10 & 11 Vic., cap. 226, sec. 53, the Legislature enacted that the Company may demand any sum that they think fit for packages not exceeding 5 cwt., notwithstanding the rate for other articles. The intention of the Company to secure a portion of the parcel profit would be effected if the tariff were thus expressed—'Senders who pack or lump parcels together, contrary to the regulations relating to parcels, will be charged either for the number of parcels combined at the parcel rate for each, or, if the number is not known, then either at the rate of 1d. per lb. or at 50 per cent. extra on the price of a single parcel, and at the option of the Company.' There is no

evidence that the Company knew or had the means of knowing, in respect of any specific parcel, that it had 'enclosures,' and so was liable to extra charge. The Railway Company charges for separate ownership as explained—that is, for the accommodation offered to *each* owner to carry his parcel for him at the time he requires; and the combination of two customers to represent a parcel as belonging to one owner which really belongs to many, and so to get service without paying for it the stipulated price, would be thought unfair, at least towards anybody but the railway companies. There is no evidence that the Company ever were enabled to distinguish a parcel with 'enclosures' from one without them. The assumption that the Company had any knowledge within the meaning of the direction to the Jury is unfounded. The difference of the circumstances of the two deliveries is that the Plaintiff's parcels were always declared to be packed; the parcels of the other senders were never declared to be so. The Plaintiff admits his liability (by the Company's rules) to the charge. The other senders intended to evade the charge, and do not disclose which of their parcels have 'enclosures' and which have not. In the one case the extra charge is paid; in the other an attempt to enforce payment of it would probably lead to the loss of hundreds of pounds in litigation, and drive away consignments to the rival railways or to the interceptors. If the Plaintiff pays no more than is right, I cannot see how he is damnified because some stranger has paid less than was the right of the Company according to law. If the Company choose to carry for nothing goods going to or from a national exhibition, as in 1851, other customers sending goods for their own purposes do not thereby acquire a right to have their goods carried for nothing. If the Company choose to carry free all reporters going to a horse race, as in *Harrison* v. *Great Northern Railway Company* (10 Ex., 376), none of the passengers going by the same train would thereby acquire a right to a return of their fares, in whole or in part, by reason of the exemption of the reporters."

Chief Justice Erle then gave the Judgment of his brothers Willes, Blackburn, Byles, Keating, Mellor, and Shee, the majority of the Court—"By the Company's tariff parcels between 1 cwt. and 5 cwt. containing packed parcels were charged

fifth class, with 50 per cent added. The Company hold forth to the public that they make a uniform charge on packed parcels, that is to say, on all parcels the contents of which come within the description of 'enclosures.' The evidence was that four wholesale houses habitually received 'enclosures' for others which they sent in packed parcels; that they did this daily and on a great scale, and without any disguise on their part; and that they were never charged according to the Company's tariff for packed parcels. No evidence was given that the Company were ever directly informed that any one specific parcel was a packed parcel, but the evidence was that no questions were ever asked by the Company. If the Company were correct in their contention that the Legislature had given them unqualified power to charge what they pleased for parcels under 500 lbs., they might lawfully make use of that power for that purpose. But it was decided by this Court in *Baxendale* v. *Great Western Railway* (32 L.J.R., 197 C.P.) that their power to do so is subject to the equality clause. We think the Jury were justified in finding, as they have done, that the equality clause was infringed as against the Plaintiff, and we think the verdict was properly directed to be for the Plaintiff." Judgment affirmed. In *Sutton* v. *The South Eastern Railway Company* it was decided that the case was in substance the same, and it was agreed that the Judgment should, without argument, follow in like manner for Plaintiff. — *Tried in Exchequer Chamber, May* 17 *and July* 10, 1865.—*From Law Times Reports, vol.* 13, *page* 221; *also in Law Journal Reports, vol.* 35, *page* 19, *Exchequer.*

The Company appealed against this decision to the House of Lords, when Lords Chelmsford (Chancellor), Colonsay, and Cairns affirmed the Judgment of the Court of Exchequer Chamber. Lord Chelmsford said—"The obligation of the Company to carry goods of the like description, and under like circumstances, at the same rate of charge for all persons alike, is imposed upon them by Acts of Parliament relating to their railway. It is argued that, as the Company did not and could not know the contents of any particular parcel sent by the wholesale houses, they could not impose upon them the charge for packed parcels. But as the Company knew perfectly

well that it was the constant practice of these houses to send packed parcels, if they desired to obey the Acts of Parliament and to avoid inequality of charge, they might have given notice that every parcel the contents of which were not declared would be treated as a packed parcel, and charged accordingly. This would have compelled the senders of parcels of this description to state what parcels contained enclosures of other persons, and what not. It appears to me to be perfectly clear that proof of specific instances of inequality of charge was unnecessary." The other grounds for the Judgment are much the same as already stated in the previous trial.—*Tried in the House of Lords, June* 20, *July* 2 *and* 3, 1868; *also April* 22 *and July* 13, 1869.—*From Law Journal Reports, vol.* 38, *page* 177; *also Law Times Reports, vol.* 22, *page* 43.

388. *Sutton* v. *London and South Western Railway Company.*—Action by a packed parcel intercepting carrier to be charged the tonnage rate upon parcels under and over 1 cwt. belonging to the same class and delivered together. He claimed that packages of same class both above and below 1 cwt. each should, when delivered in one lot, be aggregated and charged at the tonnage rate. The Company contended against this, and charged all packages over 1 cwt., when delivered together, at the tonnage rate; and all other packages under 1 cwt., delivered at the same time and of the same class, they aggregated, and if they amounted to 1 cwt. they then charged them at the tonnage rate; if not aggregating to 1 cwt., they charged them separately at the "smalls" rate. The case turned upon the following section of the Company's Act 4 & 5 Will. IV., cap. 88, sec. 155:—

"That it shall be lawful for the said Company from time to time to make such orders for ascertaining and fixing the price or sum to be charged or taken by the said Company in respect of small parcels (not exceeding 500 lbs. weight), specie and bullion, quicksilver, platina, and cochineal, to be carried upon the said railway, and from time to time to repeal or vary the same as to them shall seem proper: provided always that the provisions hereinbefore contained as to parcels shall not extend to goods, articles, matters, and things sent in large aggregate quantities, although made up of separate and distinct parcels, but only to single and undivided parcels."

Baron Cleasby said—"It appears to me the contention of Plaintiff cannot be maintained. Now the whole of the 155th

section, in my opinion, applies to 'small parcels' only. The Company may charge a small parcels rate upon parcels weighing under 1 cwt., but they may not charge that rate upon parcels sent in 'large aggregate quantities.' Now the question here is what charge is to be made in cases when what may be called a large lot (I purposely avoid using here the word parcel), exceeding the limit of a 'small parcel' in weight, is sent for conveyance by the railway, and along with it there is also sent a 'small parcel' within the limited weight. The Plaintiff contends section 155, as to 'small parcels,' does not apply in such a case, because the articles are sent in 'large aggregate quantities,' and that therefore, under the proviso in this section, the large lots and the 'small parcel' must be aggregated and weighed together, and charged at the tonnage rates upon the aggregate weight. The Company have dealt with section 155 in the manner in which it seems to me without doubt it ought to be dealt with—as applying to 'large aggregate quantities' of 'small parcels,' no matter how many of them there may be; and although the expense of these small parcels may be much greater than the expense of a single parcel of the same weight, the same amount is charged. I think the contention of the Plaintiff is wrong, and that the decision of the case should be in favour of the Company."—*Tried in Exchequer Division, June* 26, 1877.—*From Law Times Reports, vol.* 37, *page* 158.

DISCOVERY AS A MATTER OF RIGHT, AND PRIVILEGED REPORTS IN CASES OF ACCIDENTS OR CLAIMS AGAINST CARRIERS.

REFERENCE TO CASES NOT REPORTED HERE.

Friend v. *London Chatham and Dover Company*, 2 Exchequer Division, 437.
Anderson v. *Bank of British Columbia*, 2 Chancery Division, 644.
Bustros v. *White*, 1 Queen's Bench Division, 423.
Woolley v. *North London*, Law Reports, 4 Common Pleas, 602.
Cossey v. *London Brighton and South Coast*, Law Reports, 5 Common Pleas, 146.
Fenner v. *London and South Eastern*, Law Reports, 7 Queen's Bench, 767.
Skinner v. *Great Northern*, Law Reports, 9 Exchequer Division, 298.
Pacey v. *London Tramways*, 2 Exchequer Division, 440.
Baker v. *London and South Western*, Law Reports, 3 Queen's Bench, 91.
Parr v. *London Chatham and Dover Railway*, Law Times Reports, vol. 24, page 558.

PARTIES TO SUE AND BE SUED.
WHETHER SENDER OR CONSIGNEE SHOULD SUE.
SUING IN COUNTY COURTS, ETC.

Case No.

Davis v. *James* (1770) 389
Sender the right person to sue the carrier.

Moore v. *Wilson* (1787)... 390
Sender the right person to sue the carrier.

Daws v. *Peck* (1799) 391
The sender forwarded the goods by the carrier and route specified by consignee—The consignee being the owner of the goods, the sender cannot sue.

Dutton v. *Solomonson* (1803) 392
The carrier's contract is with the person in whom the property of the goods is vested.

Fragano v. *Long* (1825)... 393
Real owner of the goods may sue.

Swain v. *Shepherd* (1832) 394
Goods sent on approval—The property is not vested in the consignee, hence sender is the proper person to sue.

Freeman v. *Birch* (1833)... 395
The sender, a washerwoman, being a bailee of clothes in her possession to wash, can sue a carrier for their loss or damage.

Coates v. *Chaplin* (1842)... 396
Sender the proper person to sue.

Minor v. *London and North Western* (1856) 397
Pickford & Co. acting as railway agents in Southwark, and accepting a box at their receiving-house to forward per London and North Western Railway—The Company did not carry on business within the jurisdiction of the County Court of the district.

Case No.

Whitfield v. *South Eastern* (1858) 398
An action for libel can be maintained against a company in its aggregate capacity.

Coombes v. *Bristol and Exeter* (1858) 399
The owner of the goods must sue, and that depends upon the contract of sale between buyer and seller.

Shiels v. *Great Northern* (1861)... 400
A carrier must be sued in the Court of the district where the cause of action arose.

Brown v. *London and North Western* (1863) 401
A railway company must be sued where it "carries on its business," otherwise in the jurisdiction of its "general offices" or headquarters.

Webber v. *Great Western* (1866) 402
Whether the sending company should be sued.

Meade v. *South Eastern* (1870) 403
Flour damaged—Traffic locally carried by two Companies—Held, that the second Company, who damaged the flour, was correctly sued.

Sheridan v. *New Quay Company also, see* 229

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389. *Davis* v. *James.*—Action for cloth goods lost between Shepton Mallet and Whitechapel, London, by road carrier.

The carrier (Defendant) contended that the action ought to have been in the name of the *consignee* of the goods, and not in the name of the senders, for that the senders *parted with their property* upon their delivering the goods to the carrier, and that *no* property remained in them *after* such delivery.

The senders (Plaintiffs) answered that the present question does not turn upon the *strict* property. The carrier has nothing to do with the vesting of the property; it does not lie in his mouth to say that the sender is not the owner. He is the owner with respect to the carrier, who has undertaken *to* him and was *paid* by him.

Lord Mansfield said there was neither law nor conscience in the objection. "The vesting of the property may differ according to the circumstances of the cases, but it does not enter into the present question. This is an action upon the agreement between the senders (Plaintiffs) and the carrier. The senders were to pay him; therefore the action is properly brought by the persons who agreed with him and were to pay him." Judgment against the carrier.—*Tried in Court of King's Bench, Michaelmas Term,* 1770.—*From Burrow's Reports, vol. 5, page* 2680.

390. *Moore* v. *Wilson.*—Action for goods not carried safely and delivered.

Plaintiff (the sender) contended that the allegation that the hire was to be paid by the consignee was immaterial, and that in all cases of this kind the contract was virtually made between the carrier and the sender of the goods; that no private agreement between the sender and the consignee could vary the question as between the sender and the carrier; that, though the sender might have parted with the property in the goods, he might maintain an action against the carrier; but, at all events, the sender might be considered as the agent of the consignee for the purpose of bringing this action.

On the appeal case Justice Buller (who had tried the case in the Court below) said that, on considering the question, he found he had been mistaken in point of law, for that, whatever might be the contract between the sender and the consignee (as buyer and seller), the agreement for the carriage was between the carrier and the sender (vendor), the latter of whom was by law liable. The other two Judges being of the same opinion, the rule was made absolute. Judgment against the carrier.—*Tried in the Court of King's Bench, April* 30, 1787.—*From Durnford and East's Term Reports, vol.* 1, *page* 659.

391. *Daws* v. *Peck.*—Action for delay to two casks of gin from London to Hillmorton, in Warwickshire, whereby the time limited by two Excise permits was exceeded, and the casks were seized and forfeited to the Crown for the duty. The casks were left at the Crown Inn at West Haddon, which was

the nearest place to Hillmorton on the road which the carrier's waggon travelled, and after lying at the Crown Inn for some time the Excise officers seized them. The Plaintiff (Daws) in this case sued for the value of the gin. It appeared that he had written to the consignee as follows:—"The gin sent was in quantity and price exactly conformable to your (consignee's) order, but by what authority they were left at the Crown Inn at West Haddon remains for the innkeeper or carrier to explain or account for. All I have to observe is this, that, *the goods having been sent conformable to your orders and by the carrier you directed*, I shall certainly look to you for the amount."

It was held by Lord Chief Justice Kenyon that "the sender of the goods delivered them to a particular carrier by order of the consignee, and they were afterwards lost. The sender cannot maintain an action against the carrier for the loss, although he paid for booking the goods. The action can only be brought by the consignee." Judgment for carrier.—*Tried in the Court of King's Bench, November* 11, 1799.—*From Durnford and East's Term Reports, vol.* 8, *page* 30.

392. *Dutton* v. *Solomonson.*—Action in respect of who should sue the carrier. The carrier's contract is with the person in whom the property in the goods is vested if there be no special circumstance in respect to the purchase. The consignee is the proper person to sue the carrier if the goods are delivered to the carrier for a purchaser under a valid contract for sale. Chief Justice Lord Alvanley said—"The first objection in this case is that the delivery of the goods to the carrier was no delivery to the person who ordered them, and therefore, in that point of view, this action was commenced too soon, the writ having been sued out before the arrival of the goods in London (the goods had left Manchester on 11th August, and did not arrive in London until 9th October). When this point was first mentioned I was surprised, for it appeared to me to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser. The

whole property immediately vests in him; he alone can bring an action for any injury done to the goods, and if any accident happen to the goods it is at his risk. The only exception to the purchaser's right over the goods is that the vendor (sender), in case of the former becoming insolvent, may stop them *in transitu.*—*Tried in Court of Common Pleas, November* 28, 1803.—*From Bosanquet and Puller's Reports, vol.* 3, *page* 582.

393. *Fragano* v. *Long.*—Action for a cask hardware, from Birmingham, *via* Liverpool, to Naples. The cask reached Liverpool safely, and the shipping agents delivered it alongside the ship, and took the mate's receipt, but the cask by some accident fell into the water. The Defendant, the owner of the ship, did not know Plaintiff, and repudiated his right to recover. The goods were bought on "three months' credit from the time of arrival," and an insurance policy was effected in favour of Plaintiff. Justice Bayley said—"It appears Plaintiff sent an order to Mason & Sons, Birmingham, for the cask 'to be despatched on insurance being effected; terms to be three months' credit from the time of arrival.' But for that order the goods never would have left Mason's warehouse, and when sent they were marked with Plaintiff's initials. If the goods had been destroyed by lightning on the road to Liverpool, Fragano must have borne the loss. At Liverpool, Stokes & Co., Mason's shipping agents, shipped the goods and took a receipt. It is argued that the agent was thereby enabled to maintain an action, but that Fragano, as his principal, could not. I do not think this is correct."

Judge Holroyd said—"It is a principle of law that the real owner of the goods for whom Stokes & Co. were agents may sue for the loss although the Plaintiff was not informed of his existence. I think the goods became Fragano's property as soon as they were sent off by Mason & Co. When goods are delivered at a distance from the vendor, and no charge is made by him for the carriage, they become the property of the buyer as soon as they are sent off."—*Tried in Court of King's Bench, Easter Term,* 1825.—*From Barnewall and Cresswell's Reports, vol.* 4, *page* 219.

394. *Swain* v. *Shepherd.*—Action for the value of goods lost during road carriage between Huddersfield and Settle. The Plaintiff's (sender) clerk gave evidence that, according to the custom of the Plaintiff's business, if goods were ordered by a customer living at a distance from Huddersfield the sender forwarded the same, but if the customer on their arrival disapproved of the goods, he was at liberty to send them back, and that in such cases the Plaintiff paid the carriage both ways. No express agreement had been made with Metcalfe (consignee) on the subject. The sender at different times had supplied Metcalfe with about twenty-seven parcels of goods, and on five of those occasions Metcalfe had returned part of the goods, but no instance was given of any one entire parcel of goods being returned.

Justice Parke said—"Generally speaking, where goods of a fair merchantable quality are forwarded in pursuance of a written order which binds the person giving the order to receive the goods, the property passes to that person by the delivery to the carrier, and *he* is the proper person to sue the carrier if the goods are lost. But if the Jury believe the evidence of the Plaintiff's clerk, the goods were sent merely for approval, and no property would pass to Metcalfe until he received and adopted the goods." The Jury gave verdict for Plaintiff, establishing his right as sender in this case to sue. —*Tried at Nisi Prius, September* 4, 1832.—*From Moody and Robinson's Reports, vol.* 1, *page* 223.

395. *Freeman* v. *Birch.*—Action in respect to the right of a bailee to sue. The Plaintiff, a laundress, residing at Hammersmith, was in the habit of sending linen to and from London by the Defendant's cart, which travelled from Chiswick to London. A basket of linen, belonging to Spinks, was sent by the Defendant, who was a common carrier, and on its way to London part of the contents were either lost or stolen. Spinks did not pay the carriage of the linen. It was objected on the part of the carrier that the present action was misconceived, and that the action should have been brought by the owner of the linen.

Justice Littledale overruled the objection, and gave a verdict

for the Plaintiff, saying—"The property in the goods was entirely gone out of the vendor. In this case the laundress retained a special property in the goods."

Justice Parke said—"I am of the same opinion. In the case of vendor and vendee, if the goods are, whilst the carrier has the care of them, to be at the risk of the vendor, who must bring the action against the carrier? In ordinary cases the vendor employs the carrier as the agent of vendee.—*Tried in the Court of King's Bench, Easter Term*, 1833.—*From Neville and Manning's Reports, vol.* 1, *page* 420.

396. *Coates* v. *Chaplin.*—Action for goods lost, Liverpool to London. The goods were verbally ordered of sender (Plaintiff), Coates, and were duly forwarded by Defendants, Chaplin & Horne. The goods were addressed "J. & T. Morrison," but on arrival in London were offered to Morrison & Dillon, who refused them, saying they were addressed for another firm. It would, however, appear they were really intended for Morrison & Dillon, because their traveller had ordered them from sender. The goods were brought back to the carrier's warehouse, and from there they were lost.

Lord Chief Justice Denman, on the appeal case, said—"It seems quite clear that, as between the consignees and the senders, the property had not passed out of the senders and vested in consignees so as to allow the senders to maintain an action for goods sold and delivered. The consignees had not accepted the goods, and therefore, in the absence of a written order, the provisions of the Statute of Frauds have not been complied with so as to charge them. The order, which was a verbal one, seems to have been in general terms, a mere parol order for such and such goods, without any mention of any particular carrier, or even, as far as it appears in evidence, of any mode of carriage at all. This case seems to fall directly under the principle of *Swain* v. *Shepherd* (1 M. & Rob., 223), in the authority of which, though it may be expressed perhaps somewhat too generally, I entirely concur." Judgment against the carrier, as the sender was the proper person to sue.—*Tried in Court of Queen's Bench, June* 20, 1842.—*From Gale and Davison's Reports, vol.* 2, *page* 552.

397. *Minor* v. *London and North Western Railway Company.*—Action for £5 for loss of a box of goods, London to Bradford. The box was delivered to Pickford & Co. at their receiving-house in Union Street, Southwark, London, they holding themselves out as the agents of the London and North Western Railway Company. The case was first tried before Chief Justice Jervis at the Middlesex Sittings after Trinity Term, 1854, when a verdict for £5 was given for Plaintiff. The Plaintiff appealed as to costs, calling upon the Company to show cause why he should not recover his costs in the action. Justice Williams gave the Judgment of the Court—"The Court is of opinion that the Company did not carry on business in the borough of Southwark at the office of Pickford & Co. within the meaning of the 128th section of the County Courts Act, 9 & 10 Vic., cap. 95, for the only business carried on at that office was that which Pickford & Co. themselves carried on there, viz., the business of railway agency to the Defendants and several other companies." Judgment against Company.—*Tried in Court of Common Pleas, December* 1, 1856.—*From Law Journal Reports, vol.* 26, *page* 39.

398. *Whitfield* v. *South Eastern Railway Company.*—Action for libel. The South Eastern Company, being owners of a telegraph between Ticehurst Road and Hastings, sent a message between these places as follows:—"The Lewes Bank has stopped payment;" and Plaintiff, with others, being the proprietors of said Bank, claimed damages for the libel. The point turned upon whether, under some circumstances, express malice may be proved against a corporation aggregate. Lord Campbell held in favour of Plaintiff, and said —"Instances might easily be suggested where great injustice would be suffered by individuals if their remedy for wrongs authorised by corporations aggregate were to be confined to the agents employed. Therefore, without adverting to the second point made by the Company's counsel, that at anyrate some of the counts impute negligence to the Company in the mode of working their telegraph, we think that there ought to be a Judgment for the Plaintiff." Judgment against Company.—*Tried in Court of Queen's Bench, April* 29, 1858.—*From Law Journal Reports, vol.* 27, *page* 229.

399. *Coombes* v. *Bristol and Exeter Railway Company.*—Action for £12 18s. 4d. for a 100-lbs. package of whalebone lost between Exeter and Bristol. Consignee sued the Company, and they contended that he did not deliver the goods to them, nor did the Company receive them from him to be carried. The case turned upon the point of whether or not consignee could sue as owner of the goods. This depended upon the question of the contract between sender and consignee as to at what point the property passed.

Baron Martin said—"Consignee was at Exeter, and bought from sender some whalebone, and agreed to take a further quantity, which sender (Avery) was to send on to Bristol. This was a verbal contract. On 19th October the 100 lbs. of whalebone in question was sent on. On 21st October consignee wrote to say the whalebone had not arrived, and that he would send a draft for the price when he got it. Consignee's letter to sender promising to pay for it on its arrival shows that the consignee considered sender to be the person who was to suffer the loss, and indeed sender suggested that consignee should make a claim against the Company, and send the amount, when received from the Company, to him. At common law, upon the sale of an ascertained chattel, on delivery to a carrier the property vested in the consignee. But by the 17th section of the Statute of Frauds—

'No contract for the sale of any goods, wares, and merchandises for the price of £10 sterling or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and *actually receive* the same, or give something in earnest to bind the bargain, &c., or that some note or memorandum in writing of the said bargain be made and signed.'

Therefore, unless one of these things have happened, this contract of sale was not good—not that such a contract is absolutely void, for if either event takes place at any time after the verbal contract, the contract becomes good. One other point was made, viz., that consignee authorised sender to enter into a contract which renders the Company liable independently of the question of property. But there is no evidence of such a contract. To establish such a liability it would be necessary to show that the Company had notice of the obligation they were incurring. As there is no evidence that the property passed from Avery, he alone was the proper person to sue.

Baron Bramwell said—"I am of the same opinion. The cases clearly show that the goods were not the goods of the consignee at the time of the delivery of them to the Company. The only way, however, in which there was a delivery to the Company by consignee was under the contract of sale. But the contract of sale was invalid, and therefore no authority to the Company to receive the goods for him. But it may be said the contract to carry was made in the name of the Plaintiff, and that he might rectify it. I do not think that, in fact, the contract was made in the name of the consignee. It is more reasonable to hold that the sender, when the property is not out of him, does not contract for the consignee."

Baron Watson said—"I agree with the rest of the Court. The contract between the carrier and the person sending the goods depends upon the property. If the property has not passed out of the sender he must sue, as in the case of goods sent on sale and approval. If, when goods arrive, it is open to the consignee to repudiate them, there is no complete contract. Baron Parke, in *Swain* v. *Shepherd* (1 Moo. & Rob., 223), said—'Generally speaking, where goods of a fair merchantable quality are forwarded in *pursuance of a written order which binds the person giving the order to receive the goods*, the property passes to that person by the delivery to the carrier.' The observations of Lord Kenyon, in *Daws* v. *Peck* (T.R., 330), apply to the other view of the present case—'I cannot subscribe to one part of the argument urged on behalf of the Plaintiff, namely, that the right of property on which this action is founded is to fluctuate according to the choice of the sender or consignee, and that, consequently, either of them may at his pleasure maintain an action against the carrier for the non-delivery of the goods. In my opinion the legal rights of the parties must be certain, and depend upon the contract between them, and cannot fluctuate according to the inclination of either. This question must be governed by the consideration in whom the legal right was vested, for he is the person who has sustained the loss, if any, occasioned by the negligence of the carrier; and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured.'" Judgment for Company.—

Tried in Court of Exchequer, June 1, 1858.—*From Hurlstone and Norman's Reports, vol.* 3, *page* 510.

400. *Shiels* v. *Great Northern Railway.*—The Company were sued in the Lincoln County Court for injury to a horse, which took place at Newark. Newark is in a different county to Lincoln, and, although the Company have a station at Lincoln, the Company do not *carry on business* within the meaning of the statute 9 & 10 Vic., cap. 95, sec. 60, at every place where they have a station, but only at King's Cross, London —that is to say, only at the principal office, where the directors meet and the general business of the Company is transacted. The County Court Judge at Lincoln refused to hear the case. The question was carried to the Queen's Bench, and Justice Hill affirmed the County Court Judge's opinion. The Plaintiff may sue the Company in the district where the cause of the action arose by obtaining the leave of the Judge of the County Court of the district.—*Tried in Court of Queen's Bench, June* 11, 1861.—*From Law Journal Reports, vol.* 30, *page* 331. The following cases establish the same point:—*Bourne* v. *South Eastern Railway* (26 Law Times, page 60); *Adams* v. *Great Western Railway* (30 Law Journal, page 124, Ex.); *Brown* v. *London and North Western Railway Company* (32 Law Journal, page 318).

401. *Brown* v. *London and North Western.*—Action for damage to a harp. Plaintiff, a harpist, was travelling from Ireland, *via* Chester, to London. At Chester, not having money to pay his fare to London, he left his harp by way of security, and was given a free ticket to London. Afterwards he paid the fare to the Company, who sent him his harp. The harp suffered considerable damage in transmission. The Plaintiff sued the Company in the Chester County Court. The Company objected to the jurisdiction of the Court on the ground that the Company did not "dwell or carry on their business" in the Chester district within the meaning of the 9 & 10 Vic., cap. 95, sec. 60. The Judge overruled the objection, and the Jury found a verdict for Plaintiff for £27. The Company appealed to the Queen's Bench, when Justice Wightman gave Judgment, and said—"I am of opinion the London and North Western

Company cannot be considered 'to carry on its business' at Chester sufficiently for giving jurisdiction within the meaning of the County Court Act, and to hold it to be so would be to introduce the greatest uncertainty and inconvenience. The Act can only apply to the particular place at which the Company or party carries on his *general* business, and not to the place where he carries on only a particular portion of it. The case is entirely one of jurisdiction, there having been no leave of the County Court Judge to issue the plaint out of the jurisdiction." Justice Crompton and Justice Blackburn concurred. Judgment for Company.—*Tried in Court of Queen's Bench, June* 25, 1863.—*From Law Times Reports, vol.* 8, *page* 695.

402. *Webber* v. *Great Western Railway Company.*—Action for damage to a clock, Worcester to Chester. The question in this case turned upon the point as to which carrier should be sued. Pickford & Co., acting as carting agents, took the package from sender's house to Defendants' station at Worcester. The consignment docket was received from Pickford & Co.—"Sender, Skarrett—Two boxes, per London and North Western Railway, to Webber, Chester—Charges forward." On the first trial, in the Court of Exchequer, it was held that the Great Western Company were the contracting company.

On the appeal case Justice Willes said—"The question is whether there is sufficient evidence upon which the Jury could properly find that the contract to carry was between the Plaintiff and the Great Western Company. It does not appear that goods intended to go *via* the London and North Western Railway could be conveyed otherwise than these goods travelled, namely, from Worcester to Bushbury Junction, where the two railways—Great Western and London and North Western—connect on the direct line between Worcester and Chester. In the next place, the way-bill was made out by the Great Western Company in their office and in the form of their way-bills. Again, the London and North Western Railway Company had no line by which they could carry the whole distance from Worcester to Chester, the only line by which there was direct communication between these places being that of the Great Western Railway Company. As to the contract being with

Pickford & Co., they were agents in Worcester for both Companies. We think the view the Jury took was quite correct, and therefore the Judgment of the Court below must be affirmed." Judgment against the Railway Company for the amount of the damage.—*Tried in the Court of Exchequer Chamber, June* 19, 1866.—*From Hurlstone and Coltman's Exchequer Reports, vol.* 4, *page* 582.

403. *Meade* v. *South Eastern Railway Company.*—Action for damage by tar to flour from Framlingham to Brick Lane Station, London, thence to Bromley, in Kent, on the South Eastern Railway. It appeared the flour was placed in a truck of the South Eastern Company that had been used for the carriage of tar, and hence the damage.

On the first trial Chief Justice Cockburn held that there were two separate contracts for carriage with the two Railway Companies, Great Eastern and South Eastern, but reserved the point whether the action was rightly brought in the name of the consignee. On the facts the Jury found a verdict for Meade (the Plaintiff) for £13 18s.

On the appeal case Chief Justice Bovill said—"The South Eastern Company received the goods from the Great Eastern Company, and the question is, Who is the person that gave the authority for that delivery? All parties seem to have been acting in the usual course of business as agents for the Plaintiff (consignee), and there was evidence of that to be left to the Jury. The South Eastern Company could not have recovered their charge for carriage from the Great Eastern Company, nor from Buckmaster, the sender. They could only recover it from him by whose authority and on whose behalf the goods were delivered to them, and who did pay for the carriage, viz., the Plaintiff. There was, therefore, evidence for the Jury of a special contract between the Plaintiff and the Defendants for the carriage of the goods, and on that ground the verdict must be sustained."

Justice Brett said—"This was an action for the misuser of goods. The Plaintiff may sue for that either in respect of his right of property in the goods or in respect of a contract with the Company in regard to them. According to the declaration

here, the Plaintiff was the person who had made the contract of carriage. It is said that the Plaintiff had no property in the goods, and if that had been the point for our decision I should have been for granting the rule, though I am far from saying that the property did not pass; for by giving power to select, the Plaintiff may have waived his right to reject, and may have appointed the South Eastern Railway Company agents to receive for him. But it is not necessary to go into that, for there was evidence of a contract for carriage between the Plaintiff and the Company, because by the course of business the goods were delivered to the Company for the Plaintiff. They charged him for the carriage, and he paid for it. If so, it is not open to the Defendants to say they have not contracted with the Plaintiff to carry for him. In this case, therefore, is the element which was wanting in *Coombes* v. *Bristol and Exeter Railway Company*, as was pointed out by Baron Martin, when he says—'One other point was made, namely, that the Plaintiff authorised Avery (the sender of the goods) to enter into a contract which renders the Company liable independently of the question of property; but there is no evidence of such a contract. To establish such a liability it would be necessary to show that the Company had notice of the obligation they were incurring,' namely, notice that they were carrying for the Plaintiff. Here the Company had such notice, and had agreed to carry for the Plaintiff according to the previous course of business." Judgment against the Company.—*Tried in the Court of Common Pleas, April* 22, 1870. —*From Weekly Reporter, vol.* 18, *page* 735.

PASSENGERS' DELAYS AND TICKETS.

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GENERAL.

Case No.

Hozier v. *Caledonian* (1855) 404

Company need not make one uniform rate of charge per mile for passengers.

Rice v. *Dublin Wicklow and Wexford* (1858) 364

Railway companies cannot charge fractions of a mile in estimating third class fares.

Jones v. *Eastern Counties* (1858) 405

Company not required to issue season tickets at a uniform rate to all stations.

Motteram v. *Eastern Counties* (1859) 406

Passenger leaving a carriage while in motion—Held, that the Company's original bye-laws need not be produced in Court, and that proof of exhibition of same need only be given in respect of the stations concerned.

Langdon v. *Howells* (1879) 407

Passenger purchased a half return ticket from another passenger who could not use it—Held, that the ticket was not available.

404. *Hozier* v. *Caledonian Railway Company.*—Action for undue preference in respect to passenger fares.

		ORDINARY TRAIN.		PARLIAMENTARY TRAIN.	
		1st Class.	2nd Class.	2nd Class.	3rd Class.
	Miles.	s. d.	s. d.	s. d.	s. d.
Motherwell to Edinburgh ...	43	9 6	6 4	6 4	3 7
Motherwell to Glasgow ...	16	2 6	1 10	1 10	1 0

Contrasted with these fares, the fares exacted from passengers travelling along the whole line from Edinburgh to Glasgow, 59 miles, was 2s. first class, 1s. third class. This, the Plaintiff contended, was an undue preference.

Lord President M'Neil said—"I do not see that the Petitioner has shown any interest at all. I put the question whether he suffered any disadvantage by the proportional rating complained of, and the answer was that he did not complain of any disadvantage, but that he did not choose that parties travelling from Edinburgh to Glasgow should enjoy the benefit of a cheaper mode of travelling than he himself could enjoy. It does not appear to me to be a matter which the statute provides for at all. It provides for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain. If two towns were situated on the line of railway, and, the market day of Edinburgh being Wednesday, if the Railway Company were to resolve to carry goods on Tuesday from the one burgh, and resolved not to carry goods at all from the other burgh till Thursday for the same destination, that would be a competition of interest, and a well-founded ground for complaint under the statute at the instance of parties connected with the second station by residence or traffic, because in that case there would be an undue preference of one competing interest over another. But there is nothing of the sort here. No injury is done to the party complaining, and it is always to be regarded in a matter of this kind that a company reducing rates to all parties travelling along their line do so at their own risk, and they themselves are the parties who suffer." Judgment for the Company.—*Tried in the Court of Session, January* 20, 1855.—*From Scotch Sessions Cases, vol.* 17, *page* 302, *N.S.*

405. *Jones* v. *Eastern Counties Railway Company.*—Action in respect of undue preference. The Court refused to grant a rule for an injunction against the Eastern Counties Railway Company, under the Railway Traffic Act, 1854, to compel them to issue season tickets between Colchester and London on the same terms as they issued them between Harwich and London, upon a mere suggestion that the granting the latter (the distance being considerably greater) at a much lower rate than the former was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. Judgment for Company.—*Tried in Court of Common Pleas, January* 27, 1858.—*From Scott's Common Bench Reports, vol.* 3, *page* 718.

406. *Motteram* v. *Eastern Counties Railway Company.*—Prosecution by the Eastern Counties Railway Company of P. C. M., before the Justices of Middlesex, for unlawfully leaving a carriage while in motion at Tottenham Station, he being a passenger from Bishopsgate. The Justices inflicted a penalty of 5s. and costs. P. C. M. appealed against this decision, and the Justices submitted the case to the Court of Common Bench. Appellant (P. C. M.) contended (1) that the original bye-laws of the Company had not been produced before the Justices, and that the examined and certified copy produced was not evidence; (2) that it was necessary for the Company to prove that the bye-laws were affixed at every station on the line, as well as the two stations between which Appellant travelled; that the statute prescribes that the bye-laws are "to be hung up and affixed at every wharf or station, so as to give public notice thereof to the parties interested therein or affected thereby." The Company contended that they were authorised by the 8 & 9 Vic., cap. 20, to make bye-laws; that their superintendent of police had compared the printed bye-laws with the original, and proved before the Justices that it was a true copy; that copies of the bye-laws were exhibited at Bishopsgate and Tottenham.

Chief Justice Erle said—"I am of opinion the Judgment should be for the Company. The bye-laws is a document of a public nature, of an intensely interesting public nature, and it is

very clear, to my mind, that it must be in the custody of the secretary of the Company. The statute anticipates its being under seal and copies from it being circulated. Then it is a public document, and in a public custody, and falls within the 14 & 15 Vic., cap. 99, sec. 14. I am of opinion the section (as to publication) may be construed to mean that the publication might be with some limitation, so that the bye-laws affecting persons using a wharf should be published at the wharf, and those affecting persons using a station should be published at the station; and so I think a bye-law should be proved to have been published at the station where any person is affected thereby. I think the Justices might infer from the fact of the bye-laws having been published at the two stations that they had also been published at the other stations on the line." Justices Crowder and Willes concurred. Justice Williams dissented. Judgment for Company.—*Tried in Court of Common Bench, November* 22, 1859.—*From Law Times Reports, vol.* 1, *page* 101.

407. *Langdon* v. *Howells.*—Action in respect to a passenger travelling on a half return ticket he had purchased from another person for 3s. The ticket was originally issued at New Milford for Ludlow and back. The passenger was found in a down train at Neath, where the tickets were examined. The case was first tried before the Magistrates, who dismissed the complaint. The ticket had printed upon it the words "Not transferable."

On the appeal case Chief Justice Cockburn said--"I think that the case comes within the provisions of the statute 20 & 21 Vic., cap. 43, which provides for a passenger travelling without having previously paid his fare, and with intent to avoid payment thereof. It is not a case of a single ticket taken by 'A.,' but which 'A.,' being unable to use, hands over to 'B.,' a case which might possibly admit of different considerations. The ticket was a return ticket, which the Company issue at a cheaper rate, because they find it advantageous to issue tickets to persons intending to return, at a cheaper rate. If it is given by the original taker to a person who seeks to use it for the single journey, and so to travel at

the cheaper rate for such journey, it seems to me clear that such person does travel without having previously paid his fare with intent to avoid payment thereof, within the meaning of the Act." Judgment for Great Western Railway Company.—*Tried in the Court of Queen's Bench Division, May* 17, 1879.—*From Law Reports, Queen's Bench Division, vol.* 4, *page* 337.

Obstructing Engines, Carriages (Trains), and Meddling with Signals.

	Case No.		Case No.
The Queen v. *Hadfield* (1870) ...	408	*The Queen* v. *Hardy* (1871) ...	409

408. *The Queen* v. *Hadfield.*—Prosecution for obstructing signals by altering them. The 24 & 25 Vic., cap. 97, sec. 36, enacts that whosoever, by any unlawful act, shall obstruct, or cause to be obstructed, any engine or carriage used on any railway, shall be guilty of a misdemeanour. The station-master at Dukinfield Station, on the Manchester Sheffield and Lincolnshire Railway, about eleven o'clock on the night of the 14th January locked up all the doors of that station. He had just previously despatched the last train timed to stop at that station, and had seen that all persons, passengers and others, had left the station. He then arranged the signals for the night. There was a semaphore signal on the platform, having several arms, with a separate lever to work each arm; and there were two signals at about 200 yards distant from and on either side of the station, one on the up line and the other on the down line, and both worked by levers from the platform at the station. The clerk put out the lights of the semaphore signal, and placed the arms down to indicate the lines "All clear," and the two distant signals he arranged so as to show white lights only, indicating that the lines were clear. He went to bed on the premises, and in a few minutes heard a knocking at the station door, and immediately afterwards he heard a person, who subsequently turned out to be the prisoner, climbing over a door in the wall of the station. He still heard the prisoner walk along the platform towards the semaphore signal and rattle the levers. He then looked out of the window, and saw

that one arm of the semaphore was at right angles with the post and another at an acute angle, the former signifying "Danger," and the latter "Caution." He went out and found the prisoner outside the station near some steps leading to the door over which he had climbed to get into the station. The prisoner was not sober, and having been told by the station-master that he had been seen meddling with the signals, he ran away. He was followed by the station-master, who overtook him and gave him into custody. The driver of a goods train which under ordinary circumstances would have passed through the station without slackening speed, in consequence of the state of the signals shut off steam, and approached the station so cautiously that he could at any moment have come to a standstill. The mail train, following the goods train on the same line of rails, was due at the station half an hour after the goods train should have so passed through the station.

The case was first tried before the Quarter Sessions for Chester, from which it was referred to the Court for Crown Cases Reserved.

Justice Blackburn said—"The question is, whether what occurred amounts to causing the engine and carriages to be obstructed. Any act which causes the train to be obstructed, though not of a physical character, is, I think, within the meaning of the section. Therefore the conviction before the Magistrates ought to be affirmed." Judgment in favour of the Company.—*Tried, on appeal, June* 4, 1870.—*From Law Journal Reports, Magistrates' Cases, vol.* 39, *page* 131.

409. *The Queen* v. *Hardy.*—Prosecution in respect to obstruction of a railway train. At 10 a.m., May 24, 1870, the Defendant requested the signalman at the Luton Station on the Midland Railway to stop the goods train then coming towards it on its way to Leagrave, two and a half miles nearer to Bedford, to which latter place he was anxious to proceed in order to catch a passenger train. The signalman and station-master refused to stop the train. The Defendant was a season ticket-holder, but he had no right to travel in a goods train. The Defendant proceeded along the line 700 or 800 yards, and he placed himself on the space between the two lines of railway,

at a spot between two stations, and held up his arms in the mode used by inspectors of the line when desirous of stopping a train. The driver of the goods train, acting on the supposition that he was signalled by an inspector to slacken speed, shut off steam and reduced his speed from twenty miles an hour to four miles an hour, and the Defendant by this means was enabled to jump into the guard's van, and thereupon the train resumed its natural speed, and, without stopping, proceeded onwards. The case was first tried before Justice Keating, at Bedford, on the 26th July, 1870, upon an indictment under 24 & 25 Vic., cap. 97, sec. 36. The Defendant was found guilty, but the case was reserved for the opinion of a higher Court.

Chief Justice Bovill held that the Defendant had unlawfully obstructed the train within the meaning of the above section of the said statute. Judgment for Company.—*Tried as a Crown Case Reserved, January* 21, 1871.—*From Law Journal Reports, Magistrates' Cases, vol.* 40, *page* 62.

PASSENGERS DELAYED ON JOURNEYS AND CARRIER HELD LIABLE.

	Case No.		Case No.
G. N. v. *Hawcroft* (1852)	410	*Buckmaster* v. *G. E.* (1870) ...	412
Denton v. *G. N.* (1856)	411	*Hobbs* v. *L. & S. W.* (1875) ...	413

410. *Great Northern Railway Company* v. *Hawcroft.*—Action for £21, hire of a carriage, Doncaster to Barnsley, and loss, trouble, and inconvenience from delay. Plaintiff, a confectioner, was a third class excursion passenger, Barnsley to London and back. On 2nd August, 1851, he took a cheap 5s. return ticket, Barnsley to London and back, to visit the Exhibition. On the back of the ticket was printed—"To return by the trains advertised for that purpose on any day not beyond fourteen days after date thereof." Plaintiff presented himself at King's Cross Station, 9th August, Saturday, at about 6 a.m., to go by the 6.45 a.m. "Exhibition train." He was unable to obtain a seat, and the train left with thirty carriages, two engines, and 1,000 passengers. Plaintiff applied to the station-master to be sent on by an ordinary train leaving shortly after,

but his request was refused. About noon same day a "special" excursion train was sent off with Exhibition passengers, but again Plaintiff was unable to procure a seat. He left London by advertised "Exhibition train," 9.15 p.m. on the Saturday night, reached Doncaster 6 a.m. Sunday morning, when there was no train forward, and he hired a conveyance on to Barnsley. The case was tried in the Barnsley County Court, when the Judge decided there had been a breach of contract, and the Company consented to a Judgment against them provided it were for the £21, which would give a right of appeal. The verdict was given accordingly, and the appeal made to the Queen's Bench. Justice Patteson, in giving Judgment, said—"The commencement of the ticket, 'Barnsley to King's Cross and back,' must mean that the Plaintiff is to be carried back to Barnsley. The Company, in my opinion, engage to carry the Plaintiff back by any of the trains advertised. The option is given him to say on what day not beyond fourteen days he will return, and whether by the morning or evening train (trains advertised for excursion passengers). If it had been made known to Plaintiff that if of his own pleasure he chose to stay for the evening train on the Saturday he would have to wait at Doncaster the whole of Sunday, I cannot say that he would have had any right to damages. But it was not the Plaintiff who chose to wait for the evening train; the Company justifiably refused to take him by the morning train. I think Plaintiff is entitled to the damages." Justice Wightman concurred.—*Tried at Queen's Bench, Hilary Term*, 1852.—*Law Journal Reports, vol.* 21, *page* 178. (The error seems to have arisen in advertising certain trains as Exhibition trains, which brought them within the scope of the contract on the ticket, quite irrespective of the absence of Barnsley on bill where the 9.15 p.m. was advertised to leave King's Cross.)

411. *Denton* v. *Great Northern Railway Company.*—Action for £5 10s., expenses, loss, and inconvenience from being detained at Milford Junction for a night, and unable thereby to reach Hull in time to attend to his business. The Company, in their March time-tables, advertised a train as a through train to Hull, to leave London at 5 p.m., calling at

Peterborough at 7.20 p.m., and reaching Hull about midnight. It appeared that on the 27th February, 1855, when the time-tables had been printed, but not issued, the North Eastern Railway Company had given Defendants notice they would not continue the next month to run their train in connection with the 5 p.m. train on from Milford Junction to Hull. It appeared the Company did not suppress their time-tables, but continued issuing them. On the 25th March Plaintiff took a ticket at Peterborough for Milford Junction, not being able to get a ticket by the train beyond in the direction of Hull. The case was first tried in the Bloomsbury County Court, but not settled, and was removed by consent to the Queen's Bench. On the new trial the Company contended they had made no contract, and the advertisement only amounted to saying the Company were willing to contract if persons offered themselves, and that a contract to make a contract was something novel; that they were not liable for a false representation, as the damage to Plaintiff was caused by something which occurred off their line.

Chief Justice Lord Campbell gave Judgment—"It seems to me railways would not be that benefit we find them if the time-tables are to be treated as so much waste paper, and not considered as the foundation for a contract. I think the Plaintiff is entitled to recover, both on the ground that there was a contract and also for a false representation. We have here both a promise and a good consideration, and that in law constitutes a contract. An intended traveller makes all his arrangements with a view to the promise in the time-table being performed. The undertaking by the Company seems to me clearly indicated by that which is found on the face of the time-table. There is a conditional promise, and when the condition has been performed it becomes absolute. It can make no difference that the whole of the line is not the property of Defendants; it is enough the time-table says that the train will run the whole of the way. The time-table contained what the law calls a false and fraudulent representation, and the Defendants thereby made themselves liable. It is an established rule of law that where a false representation is made knowingly, to which another gives credit, and damage is suffered, he has a remedy by action against the person who has

made the representation." Justices Wightman and Crompton concurred. Justice Crompton said that an action would lie against the Defendants for a breach of duty in refusing to take the Plaintiff to Hull as advertised.—*Tried in Court of Queen's Bench, January* 19, 1856.—*From Law Journal Reports, vol.* 25, *page* 129.

412. *Buckmaster* v. *Great Eastern Railway Company.*—Action for delay to passenger. Plaintiff, a miller and a season ticket-holder, went to Framlingham Station, on a branch line, to take the 6.45 a.m. train to London to attend the London corn market. The train was ready, but the engine had not sufficient steam up, and could not go. Hence Plaintiff, at an expense of £39 14s., took a special train, and now claimed that amount and damages. The Company contended they gave notice in their time-tables that they would not be liable for any delay in the starting or arrival of trains arising from accident or other causes. Baron Martin held that "other causes" meant "other causes in the nature of accident." A railway company cannot absolve themselves by these words from negligence. It appeared the inability of the engine arose from the engine fire not having been lighted sufficiently early for the steam to have been got up. Judgment against Company for £39 14s. and £10 damages. —*Tried in Court of Exchequer, November* 10, 1870.—*From Law Times Reports, vol.* 23, *page* 471.

413. *Hobbs* v. *London and South Western Railway Company.*—Action for being overcarried, inconvenience, illness, &c. Plaintiff, with his wife and two children, seven and five years of age, had been spending the day at Wimbledon. They went to the Wimbledon Station between half-past 11 and 12 p.m., and were told that a particular train would take them to Hampton Court Station, from which place their home was between two and three miles. Plaintiff took tickets for Hampton Court. It appeared that on this particular night this train did not stop at Hampton Court, and Plaintiff was carried on to Esher Station. They were then six miles from home. No conveyance could be got, or accommodation at any inn. The night was misty, the road dark and lonely, and the wife and children greatly fatigued by the walk. The wife caught a chill, and was laid up for some

time, and the husband incurred expense for medical attendance and necessaries, and was deprived of the assistance of his wife in his business. The case was first tried at the Surrey Spring Assizes, 1874, before Chief Baron Kelly, and a verdict given for Plaintiff of £8 beyond the £2 paid into Court, damages for the walking and inconvenience, and £20 for the illness of the wife and her sufferings—damages £30 in all. The Company appealed against the £20 for the wife's illness, and on the appeal case Chief Justice Cockburn said—"I am of opinion our Judgment must be for the Company in respect to the £20, and that the verdict should stand as regards the £10. There was a breach of contract. Plaintiffs did their best to diminish this by trying to get into an inn or to get a conveyance, but they could not do so, and had no alternative but to walk. As there was this personal inconvenience, I am at a loss to see why that should not be compensated by damages in an action like this. The case of *Hamlin* v. *Great Northern Railway Company* is not an authority that personal inconvenience should never be taken into consideration, and, if it had so held, I should not agree with the decision. I think there is no authority for saying that personal inconvenience, however serious, cannot be the subject of damages in such a case. As to walking home, it must be in the contemplation of the parties that passengers put down at a wrong place will have to get home. If there are means of doing so, they must avail themselves of them, and the Company are responsible for the cost incurred. If there are no such means, the Company are responsible, and must compensate for the inconvenience which the absence of means causes. In the case of the cold caught, that is not the primary, but the secondary consequence, and too remote." Justices Blackburn, Mellor, and Archibald concurred. Judgment against the Company for £10, and in the Company's favour in respect of the £20.—*Tried in Court of Queen's Bench, January* 15, 1875.—*From Law Journal Reports, vol.* 44, *page* 49.

SHOWING TICKETS, ORDINARY AND SEASON.

	Case No.		Case No.
Woodward v. *E. C.* (1861) ...	414	*Jennings* v. *G. N.* (1865)	415

414. *Woodward* v. *Eastern Counties Railway Company.* —Refusal to produce his ticket by a season ticket-holder. The Plaintiff had taken an annual ticket between London and Brentwood. On the 16th February, at Stratford Station, he was asked for his ticket. He refused to show it, saying he did not intend to produce it on that or on any other journey. The collector knew the Plaintiff was the holder of an annual ticket. The Justices convicted Plaintiff in 10s. and costs. In addition to the Company's bye-law, the Plaintiff, on receiving the ticket, signed a memorandum that he would "produce the ticket on entering the Company's carriages, or when required by the Company's servants, or in default thereof pay the ordinary fare." On the ticket was a printed notice referring to the bye-law. The Plaintiff appealed to the Bail Court, when Justice Wightman affirmed the conviction, saying—"I am of opinion the conviction was right. It is just as important to enforce the production of annual as ordinary tickets. Anyone might state that he was the holder of an annual ticket without being so in fact, unless he were bound to show it. But it is urged Plaintiff does not come within the terms of the bye-law as he is not bound to *deliver up* his ticket. He may, however, be required to show it without delivering it up. There is a distinction made in the bye-law between producing the ticket and delivering it up, and I think the Plaintiff falls within the terms of the bye-law. By the notice on his ticket the holder is to be subject to the regulations of the Company. It is said, however, that the contract between the Company and the Plaintiff excludes the application of the bye-law in this case. I do not agree with that view, and I think that both under the bye-law and the contract he was bound to produce his ticket, that by not producing it he incurred the penalty imposed by the bye-law." Judgment for Company.—*Tried at the Bail Court, May* 6, 1861.—*From Law Journal, Magistrates' Cases, vol.* 30, *page* 196.

415. *Jennings* v. *Great Northern Railway Company.*—Claim for £5 12s., damages and expenses incurred owing to the Plaintiff's three jockey boys being left behind, and Plaintiff having to hire persons to go with his horses to lead them from Ely to Newmarket. The Plaintiff was at the Lincoln Races, and at Lincoln Station booked three horses and took three third class tickets to Peterborough for his boys, and a first class ticket for himself, he being a horse trainer. The train being heavy, it was divided into two trains, one part sent on at 6.9 p.m. and the other at 6.35 p.m. Plaintiff kept all the tickets, and his carriage was on the first train; as the train was starting, he called to an official that he had taken tickets for the three horses and three boys, and the official answered "All right, sir." Before the second train left, the ticket examiner found the boys in the boxes with the horses, and without tickets. It appeared there were twenty boys among the horses, and only twelve tickets had been issued, and it was a regular thing for the Company to be robbed in this manner by the connivance of the grooms. The three boys were turned out and left behind. The Company pleaded their bye-law as to no passenger being allowed to enter any carriage without paying his fare and obtaining a ticket, and producing the ticket when required. The case was first tried before Chief Justice Erle, at the Cambridge Summer Assizes, 1865, when the Jury gave Plaintiff a verdict for £5 12s. The Company appealed, and contended that it was Plaintiff's own fault that the lads were in the condition of not being able to show their tickets. The Court pointed out the inconvenience to the heads of families and proprietors of schools, &c., such a requirement would cause if each child was to have his or her own ticket. Chief Justice Cockburn said—"I am of opinion that there should be no rule in this case. It is unnecessary to determine whether, supposing the Company had given the tickets to the boys themselves, and the boys had not produced their tickets, having been once allowed to enter the carriages, it would be competent for the Company to turn them out of the carriages. The bye-laws were framed by the Company for the protection of the Company, and the ground upon which I think there should be no rule is, that if the Company wish to enforce them for their own benefit,

they must keep themselves in a position in which they can do so. In the present case they have put it out of their power to do so consistently with their contract with the master of the boys, for here they entered into a contract with the master to carry the boys, instead of contracting with the boys and giving them a ticket each. In turning the boys out of the train the Company broke their contract with the master. Neither the master nor the boys were responsible for the division of the train. The Company delivered out the boys' tickets to the master, and it must be taken that they did not intend to enforce the bye-law in this particular case." Judgment against the Company.—*Tried in Court of Queen's Bench, Nov.* 4, 1865. —*From Law Times Reports, vol.* 13, *page* 254.

PASSENGERS DELAYED ON JOURNEYS AND CARRIER HELD NOT LIABLE.

	Case No.		Case No.
Hamlin v. *G. N.* (1856)	416	*Thompson* v. *Midland* (1875) ...	420
Prevost v. *G. E.* (1865)	417	*Fitzgerald* v. *Midland* (1876) ...	421
Hurst v. *G. W.* (1865)	418	*Leblanch* v. *L. & N. W.* (1876) ...	422
Cumming v. *D. & D.* (1868) ...	419		

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416. *Hamlin* v. *Great Northern Railway Company.*—Action for £50, detention of passenger. Plaintiff, a master tailor, travelling to see customers at fixed times and places, took a ticket, London to Hull. He expected to reach Hull same night, but the train did not reach Grimsby in due time, and he could not get beyond. He reached Hull next day, paying 1s. 4d. fare, Grimsby to Hull. This delay disarranged the whole of his tour, and detained him a week longer than it ever took him before to do the same tour. The Judge granted him 2s. for his bed at Grimsby, 1s. 4d. fare, and 1s. nominal damages, not over 5s. at the outside. He said had Plaintiff posted to Barton the same night, and hired a special boat to cross the Humber to meet the train to the North by which he was desirous of proceeding, he would have been entitled to recover the expenses so incurred; but not having incurred that expense, he could not recover it as damages. Plaintiff subse-

quently applied to full Court for a new trial on ground of misdirection, but it was refused.—*Tried November* 19, 1856.—*From* 1 *Hurlstone and Norman's Reports, page* 408.

417. *Prevost* v. *Great Eastern Railway Company.*—Action for delay to a passenger and overcarriage. Plaintiff on 5th June, 1865 (Whit Monday), went to Lea Bridge Station to take the 2.37 p.m. train for Mile End Station. He was told by a guard and the ticket clerk the train would stop at Mile End. The train did not come up to Lea Bridge until 3 p.m. Plaintiff proceeded by it, but owing to delays on the journey it did not reach Shoreditch (London) until 4.45 p.m. The train did not stop at Mile End. If the train had left Lea Bridge as advertised, at 2.37 p.m., it was due at Mile End at 2.54 p.m. Plaintiff had an appointment at 3.30 p.m. ten minutes' walk from Mile End, and was unable to keep it. On arrival at Shoreditch there was no train back to Mile End for an hour, so Plaintiff took a cab, but did not arrive at the place of his appointment until about 5 p.m.

The Company contended they were not responsible, and that there was no negligence, and put in a copy of their time-table, containing the following notice :—

"These tables show the time at which the trains may be expected to arrive and depart from the several stations. Every exertion will be used to insure punctuality, but the departure or arrival of trains at the time stated will not be guaranteed, nor will the Company hold themselves responsible for delay or any consequences arising therefrom."

In the next case of *Hurst* v. *Great Western Railway Company* it was held that the mere taking of a ticket did not prove a contract or duty on the part of the Company that the train should be at the station at the time when the passenger expected it.

Justice Crompton said that damages for the loss of an appointment were not, in his opinion, recoverable. "The Company very properly decline to guarantee the time of the arrival or departure of trains, because there may be accidents or other matters which render punctuality impossible. It is, however, the duty of the Company to use due and proper care with the view of insuring punctuality. I think the contract and duty is simply that the Company will use proper care, and

not be negligent. The Jury finding that there was no proof of negligence, I rule that in this case the Plaintiff can only recover on the ground that there has been negligence or want of care on the part of the Company. Negligence or a breach of duty must be proved to entitle the Plaintiff to recover. The Jury say there was none, and the Plaintiff must be non-suited." Verdict for Company.—*Tried at Nisi Prius Summer Assizes, Home Circuit, August* 10, 1865.—*From Law Times Reports, vol.* 13, *page* 21.

418. *Hurst* v. *Great Western Railway Company.*—Action for twenty-four hours' detention at Gloucester through two trains not connecting. Plaintiff was journeying from Cardiff to Newcastle on a through ticket. The train from Milford which should have reached Cardiff at 4.34 p.m., owing to an accident, did not arrive until 6 p.m., and did not reach Gloucester in time for Plaintiff to go forward by the Midland train at 8.17 p.m. A porter at Cardiff told Plaintiff the train was late owing to an accident. A long correspondence ensued between Plaintiff and the Company, in which the Company, while denying their liability, offered Plaintiff some portion of his claim, but not sufficient to induce a settlement. On the first trial the Judge refused to non-suit, and left it to the Jury, who gave a verdict for the Plaintiff. Leave was reserved to the Company to move to set aside the verdict and enter a non-suit, on the ground of there being no evidence of a cause of action. On the appeal case Chief Justice Erle gave Judgment —"I am of opinion the Judgment must be for the Company, on the ground that there is no evidence of a breach of any duty or contract by the Company. The whole case rests on the ticket from Cardiff to Newcastle, and I am of opinion that the mere taking of a ticket does not prove a contract that a train will arrive at the time when it is expected. The train, no doubt, was expected to arrive earlier than it did, and if the time-bill had been put in evidence we should have seen what the contract was as to its arrival. (N.B.—No doubt the time-table contained the usual notice that the Company would not guarantee the times of arrival and departure, hence Plaintiff's counsel did not want to make it evidence.) No special con-

tract arises from mere talk with officials—casual talk with an official whose duty may merely be to open or shut the doors of the carriages, and indeed all that the porter says is that the train is late. It is quite consistent with all that appears in this case that the duty of the Company may have been fulfilled, and it lies with the Plaintiff to show that it was not." Justices Willes, Byles, and Smith concurred. Judgment for Company. —*Tried in Court of Common Pleas, June* 10, 1865.—*From Law Journal Reports, vol.* 34, *page* 264.

419. *Cumming* v. *Dublin and Drogheda Railway Company.*—Plaintiff, a third class passenger, Dublin to Monaghan, claimed damages for detention of himself and luggage. He left the train at Drogheda, and, returning, got into a branch line train for Navan. Through this delay he had to go by evening train to Ballybay, and post, at an expense of 10s., to Monaghan. His portmanteau and despatch-box were allowed to go on to Londonderry. The former contained two sealed records for the trial of two actions at Monaghan in which Cumming was Plaintiff, and which actions he lost from the absence of the papers. The Judge directed the Jury that no special damages could be recovered for delay of the records. The Jury awarded 6d. damages for delay to the luggage, and 10s. for post car. The Jury held that it was through default of Company's servants that Plaintiff was left behind and that his luggage was overcarried. An appeal was heard before Queen's Bench for a further sum of £5 for personal inconvenience and discomfort, having been detained for several hours on his journey by Company's neglect. The Court decided he was not entitled to any general damages for the mere personal inconvenience and discomfort, unless he could show actual injury or special loss, of which no evidence (beyond cost of car) had been given.—*Tried before Justice O'Brien and Special Jury at Nisi Prius, Dublin, Michaelmas Term*, 1868, *and subsequently, on conditional order, before full Queen's Bench.*

420. *Thompson* v. *Midland Railway Company.*—Action for 14s. 7d., hotel expenses at Bristol for two passengers, owing to two passenger trains not connecting. The Plaintiff and his sister-in-law were tourist passengers travelling on a return

tourist ticket, Worcester to Ilfracombe and back, *via* Midland Railway to Bristol, thence by Bristol and Exeter to Portishead, and thence by steamer to Ilfracombe. On the return journey the train that was timed to start from Portishead at 5.45 p.m. did not leave until 6.40 p.m., and hence, on arrival at Bristol, the Midland Company's last train to Worcester at 7 p.m. had left, as the Portishead train did not reach Bristol until 7.20 p.m. The Midland Company contended their time-tables gave no information as to the times of trains to or from Portishead, but they gave notice to the public as follows:—

"The granting of tickets to passengers to places off the Company's line is an arrangement made for the greater convenience of the public; but the Company does not hold itself responsible for any delay, detention, or other loss or injury whatsoever arising off its lines, or from the acts or defaults of other parties, nor for the correctness of the times over other lines or companies."

Also, on the second page of tourist programme, notice was given—

"The tickets are issued by any of the through trains of the Company, and are available by any trains (except those specially mentioned). The Company do not undertake that the trains shall start or arrive at the times specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delay or detention."

The case was first tried in the Worcester County Court, when a verdict was given for the Company. The Plaintiff then appealed, and on the appeal Justice Blackburn said—"It seems as if the Company did not enter into the sort of contract which Plaintiff contended for;" hence Judgment for Company.—*Tried in the Court of Queen's Bench, April* 23, 1875.—*From Law Times Reports, vol.* 34, *page* 35.

421. *Fitzgerald* v. *Midland Railway Company.*—Action for £17 for delay to a passenger booked, Birmingham to Lincoln, by 4.53 p.m., in October, 1875. In consequence of floods the train was three hours late arriving at Derby, viz., 9.30 p.m., and there was no train forward that night to Lincoln. Plaintiff slept at Derby the night, and went on at 6.25 a.m. next morning, expecting to reach Lincoln at 9.10 a.m.; but at Trent, owing to the floods, the train could not proceed, and Plaintiff then went home to London and did not proceed to Lincoln, the object of his journey having passed. The Birmingham County

Court Judge gave Plaintiff a verdict for £5; but the Company carried the case to the Court of Appeal, when Barons Bramwell and Grove reversed this decision, and gave Judgment for Company.—*Tried in Court of Appeal, June* 2, 1876.—*From Law Times Reports, vol.* 34, *page* 771.

422. *Leblanch* v. *London and North Western Railway.*—Action for £11 10s., cost of a special train from Leeds to Scarborough. Plaintiff on the 10th August, 1874, was a passenger, Liverpool to Scarborough. The train arrived at Leeds seven minutes after the train for Scarborough had left. Had the train reached Leeds in time to connect with the Scarborough train, Plaintiff would have reached Scarborough at 7.30 p.m. By other trains leaving Leeds and York he could have reached Scarborough at 10 p.m., and even by the special train he did not arrive until between 8.30 and 9 p.m. Plaintiff was going to Scarborough for amusement, and did not consequently suffer any serious inconvenience. The case was first tried in the Middlesex County Court without a Jury, when Judgment was given for Plaintiff for the amount claimed.

The Company then appealed to the Court of Common Pleas, who confirmed the Judgment of the the County Court Judge.

The Company then carried the case to the Court of Appeal, before Lord Justices James, Mellish, and Baggallay, Justice Mellor, and Baron Cleasby, when the previous Judgments were reversed, and Judgment given for the Company; and it was held that the Company were not responsible for the times mentioned in the time-table not being kept.—*Tried in Court of Appeal, November* 22, 1875, *January* 11, *February* 16, 17, *and May* 10, 1876.—*From Law Journal Reports, vol.* 45, *page* 521.

PASSENGERS TRAVELLING IN A HIGHER CLASS CARRIAGE THAN WARRANTED BY THEIR TICKETS.

	Case No.		Case No.
Bentham v. *Hoyle* (1878)	423	*Dyson* v. *L. & N. W.* (1881) ...	424

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423. *Bentham* v. *Hoyle (Lancashire and Yorkshire Railway Company).*—Prosecution of the Appellant (Bentham)

for travelling between Stackstead and Bacup in a *first* class carriage when he held a *second* class season ticket. Hoyle, the Lancashire and Yorkshire Company's ticket collector, was the nominal Respondent. The Company's bye-law is as follows:—

"All passengers travelling, without the special permission of some duly authorised servant to the Company, in a carriage or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40s., and shall, in addition, be liable to pay his fare according to the class of carriage in which he has travelled from the station where the train originally started, unless he shows that he had no intention to defraud."

The case was first tried at Bacup Petty Sessions, 16th May, 1877, when the Justices convicted Bentham. It was proved he rode in a first class carriage, and did not pay the excess fare. It was found, as a fact, that Bentham had no intention to defraud the Company.

The Justices submitted the case to the Queen's Bench, when Lord Chief Justice Cockburn said—"I think the conviction must be quashed. Either the last part of the bye-law applies to the whole, namely, to the penalty as well as to the liability to pay the fare in addition from the place where the train originally started, or that, if this be not so, the bye-law itself is unreasonable and void. Now, if the intention to defraud is necessary to constitute the offence under the bye-law, then, as it has been found as a fact that no such intention existed on the part of Bentham, there ought not to have been a conviction. Again, if a fraudulent intention is made immaterial under the bye-law for the particular offence for which proceedings were taken by the Company, then I am of opinion that such bye-law was altogether void as being repugnant to the general Act of Parliament; and therefore, *quacunque via* this bye-law is regarded, it seems to me this conviction cannot be sustained. I think the *mens rea* must exist in order to create the offence. If the element of intention is omitted, the bye-law is inconsistent with the statute." Judge Manisty concurred. Judgment against Company.—*Tried in Court of Queen's Bench, January* 24, 1878.—*From Law Journal Reports, M.C., vol.* 47, *page* 51.

424. *Dyson* v. *London and North Western Railway Company.*—Action by a railway company for penalty of 40s.

owing to Defendant travelling in a different class to the class marked on his ticket. Defendant held a *second* class season ticket between Huddersfield and Marsden and the intermediate stations. On the 29th September, 1880, he travelled between Longwood and Marsden in a *first* class carriage. He passed out of the station at Marsden and did not offer the difference in fare, and the matter not being then known to the station-master, no demand was made for the excess fare.

The Company brought Defendant before the Petty Sessions at Huddersfield, 16th November, 1880.

The information was made under the 8th bye-law of the Company, made in pursuance of the statute 8 Vic., cap. 20, secs. 108 and 109, and duly certified by the Board of Trade, which 8th bye-law is as follows:—

"Any person travelling, without the special permission of some duly authorised servant of the Company, in a carriage or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40s., and shall, in addition, be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started, unless he shows that he had no intention to defraud."

The Justices considered the case proved, fined Defendant 10s., and held that he had intended to defraud the Company. The Defendant was dissatisfied with the decision, and desired the Justices to state a case for the Judgment of the Court of Queen's Bench.

Justice Lindley, in giving Judgment, said—"I have no doubt the Railway Company has power to make bye-laws. The first thing we have to do is to construe this bye-law, and it appears to me distinctly divisible into two parts. The first part is—'Any person travelling, without the special permission of some duly authorised servant of the Company, in a carriage or by a train of a superior class to that for which his ticket was issued, is hereby liable to a penalty not exceeding forty shillings.' That is the first part, and we cannot add on to that part the words 'unless he shows that he had no intention to defraud,' which are really added to the second part, which is—'And shall, in addition, be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started.' I think the bye-law

means exactly what it says—that a person so travelling is liable to a fine of forty shillings, and in addition, unless he shows that he had no intention to defraud, he is liable to pay the extra fare. If the bye-law is one and indivisible it is clearly bad; but I think it is divisible, and I come to consider whether the first part is bad.

"The Railway Clauses, 8 & 9 Vic., cap. 20, sec. 103, is in these terms—

'If any person travel or attempt to travel in any carriage of the Company, or of any other company or party using railway, without having previously paid his fare, and with intent to avoid payment thereof; or if any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance without previously paying his fare for the additional distance, and with intent to avoid payment thereof; or if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall, for every such offence, forfeit to the Company a sum not exceeding forty shillings.'

"The Company have here struck out the whole gist of the offence, in direct contradiction of section 103. Looking at the power to make bye-laws, we see that they must be in conformity with the Act. Now the conclusion I have come to is that the bye-law here is severable, and the only part which is material is bad, upon the authority of *Bentham* v. *Hoyle* (37 Law Times Reports, N.S., 753; 47 Law Journal, 51 M.C.)."

Justice Mathew said—"I am of the same opinion. I think the directions in the statute have not been observed, because the bye-law is intended to secure to the Company more than Parliament has given them. The principle that bye-laws should be upheld even if in part good seems to me dangerous. I agree that the bye-law is divisible, and the result is to divide it into two bye-laws, both of which are, in my opinion, bad." Conviction quashed. Judgment against Company.—*Tried in Court of Queen's Bench, March* 29, 1881.—*From Law Times Reports, vol.* 44, *page* 609.

Excess Fares.

Case No.
Great Western v. *Pocock* (1879) 425

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425. *Great Western Railway Company* v. *Pocock.* Action for 3d., excess fare from Westbourne Park to Padding-

ton. Mr. Pocock took a return ticket for 2s. 6d. from Westbourne Park to West Drayton, and on the return journey he travelled beyond Westbourne Park to Paddington, and 3d. excess was demanded. He declined to pay, because a return ticket, Paddington to West Drayton, was only 2s. 6d., the same fare. The case was first tried in the County Court, when Judgment was given against the Company. The Company appealed to the Exchequer Court. Baron Huddleston said—"This is really a question of contract. The ticket is undoubtedly the contract between the parties, and that contract is that in consideration of 2s. 6d. the Company agree to carry Pocock from Westbourne Park to West Drayton, and on the same day to bring him back to Westbourne Park. When he arrived on his return journey at Westbourne Park the contract was at an end, and the Company had fulfilled their part of the contract, and Pocock was not entitled to travel on to Paddington on the ticket." Justice Hawkins concurred. Judgment for Company.—*Tried in Exchequer Court, November* 7, 1879.—*From Law Times Reports, vol.* 41, *page* 415.

Payment of Fare from Starting Place of Train when Passenger is Unable to Produce a Ticket.

	Case No.		Case No.
Dearden (*L. & Y.*) v. *Townsend* (1865)	426	*L. B. & S. C.* v. *Watson* (1879)	428
Brown v. *Great Eastern* (1877)	427	*Saunders* v. *South Eastern* (1880)	429

426. *Dearden (Lancashire and Yorkshire Railway Company)* v. *Townsend.*—Action for the first class fare, Salford to Newchurch. Defendant took a first class return, Ewood Bridge to Salford (Manchester) and back. On the return journey he travelled beyond Ewood Bridge to Newchurch. Upon alighting at Newchurch he presented his half return ticket, stated he had travelled beyond Ewood Bridge, and offered to pay the first class fare, Ewood Bridge to Newchurch. The station-master refused to accept it, and demanded the full single fare, Salford to Newchurch. Defendant refused to pay. He was summoned before the Petty Sessions at Rawtenstall under the Company's bye-law, which provides that persons are not allowed

to enter any carriage without purchasing a ticket, and, failing to produce their ticket when demanded, are required to pay the fare from the place whence the train originally started, &c. The Magistrates dismissed the information upon the ground that the bye-law did not apply to the case. An appeal was then taken to the Queen's Bench, when Chief Justice Cockburn said—"The Secretary of State would never have assented to such a bye-law if it was understood that it was to have the effect the Company claimed—that when you know where the man comes from, and he produces his ticket for part of the journey and is ready to pay the remainder, he should be charged for the whole journey. The ticket which he produced showed where he came from. He has a ticket for a portion of the journey, and it is iniquitous to charge him for the whole journey. If the Defendant had wished to get out to take a fresh ticket, the guard most probably would have said, 'Oh, no; pay the difference at the next station.' I am of opinion that the decision of the Magistrates in this case was right, and the case was one in which the Defendant could not be convicted under this bye-law, it being perfectly clear upon the facts that this gentleman was perfectly innocent of any intention to defraud the Company. I think that the bye-law relates to the case of parties who, having taken a ticket, are travelling in a carriage, but who fail to produce the ticket when required." Justice Mellor said—"I do not think it ever was intended to give the Company the power to say that a man who is travelling without a ticket ten miles, but who travels honestly and without any intent to evade payment, is thereby to become liable to the penal consequences of forfeiting the fare for 100 or 200 miles." Justice Lush said—"If the Company made a bye-law to the effect that any person who, having paid his fare to a station-master for a certain distance, should continue beyond, however innocently, must pay for the whole distance, that bye-law would be void, the 103rd section of the statute having said that it should be an offence only when it was done with a fraudulent intent." Judgment against the Company.—*Tried in Court of Queen's Bench, November* 11, 1865.—*From Law Times Reports, vol.* 13, *page* 323.

427. *Brown* v. *Great Eastern Railway Company.*—Action for 7s. 6d., fare from Colchester to Stratford. At Stratford Mr. Brown was asked to show his ticket, which he refused to do. He was asked from what station he had come, and he replied "From ——" (which was not on the Company's line). He afterwards added "the collector knew very well where he came from, and that he was a season ticket-holder." It turned out he held a second class season ticket between Brentwood and Liverpool Street Station (London), and the fare from Brentwood to Stratford was 3s. 6d. The Company summoned Mr. Brown before two Justices of the Metropolitan Police for the fare from the station the train started from, viz., Colchester, and they referred the case to the Court of Queen's Bench on the following points:—

1. Whether a demand for the sum required by the Company (7s. 6d.) to be paid was necessary at the time the offence was committed, or whether the proceedings taken before us were a sufficient requirement under the said bye-laws?

2. Whether the extra payment required to be made under the said bye-law (Mr. Brown being a season ticket-holder from Brentwood only) was a forfeiture, and recoverable within the meaning of the statute 8 & 9 Vic., cap. 20, or whether it constituted a penalty, and consequently came within the principles laid down in *Dearden* v. *Townsend?*

Justice Lush said—"I should say, if it were necessary to decide the point, that the fare due under the Company's bye-law is in the nature of a penalty, for the amount of the fare from the original station whence the train starts is generally a larger sum than the passenger would have to pay from the station whence he started, and he has to pay it for some act of omission on his own part. I am also of opinion that the bye-law is not bad merely because it does not fix the exact amount which is to be paid, for it has been held that a bye-law is good which imposes a reasonable charge the exact amount of which must be subsequently ascertained. However, it is not necessary to decide that point, as I am of opinion that as the amount was uncertain, and had to be ascertained by reference to the place from which the train originally started, and as that fact is presumably better known by the Company than by

the passenger, it was necessary that a demand should have been made at the time for the amount of the fare. The ground on which I decide this case is that, before proceedings are taken under the bye-law, notice of the amount claimed must be given to the passenger." Justice Mellor concurred. Judgment against Company.—*Tried in Court of Queen's Bench, June* 7, 1877.—*From Law Times Reports, vol.* 36, *page* 767; *also Law Journal Reports, vol.* 46, *page* 231, *M.C.*

428. *London Brighton and South Coast Railway* v. *Watson.*—Action by Railway Company for 1d. fare excess. Defendant, without intent to defraud, travelled from Norwood Junction to Lower Norwood without obtaining a ticket. At Lower Norwood he tendered the fare for the distance travelled; the Company demanded the fare from New Croydon, the place from which the train started. The difference between the two fares was 1d. Ultimately the fare from Norwood Junction to Lower Norwood was paid, and the Company brought an action in the Surrey County Court to recover the 1d. fare from New Croydon, the starting place of the train. The decision in the County Court was against the Company. An appeal was made to the Court of Common Pleas, and there again the decision was against the Company. An appeal was then made to the Court of Appeal, when Lord Justice Bramwell said—"It was argued for the Company that the amount claimed was a fare, and not a penalty, and therefore recoverable, not before two Justices as a penalty, but as a debt in the County Court. I am of opinion it is not a debt, and that the Company have no power to create such a debt. I have no doubt that a railway company may demand and insist on payment before taking a passenger, and that if they give him credit for his fare they may insist upon any sum they think fit, and, if he agrees to it, it would be a valid debt recoverable as such. But if he does not agree to it, he may indeed be a trespasser in getting into the carriage, and liable to damages as such, or they may waive the tort and recover a fare on the *quantum meruit* scale; but they cannot fix or insist on a fare at their pleasure. They have not sued for trespass or a tort, but for a fare. They have not shown, and of course could not show, that the Defendant ought

to pay more than the ordinary fare. Consequently the appeal fails, and the Judgment must be against the Company."—*Tried in Court of Appeal, December* 20, 1878, *and February* 1, 1879. —*From Law Journal Reports, vol.* 48, *page* 316.

429. *Saunders* v. *South Eastern Railway Company.*— Action for 1s. 4d., excess fare Blackheath to Waterloo, Blackheath being the starting place of the train. Plaintiff held a season ticket over the two lines, available from either Charing Cross or Cannon Street to Windsor and back. On the 26th February Plaintiff arrived in a South Eastern train at Waterloo Junction, and was about to pass the barrier to go to the London and South Western Company's train for Staines, when he was asked to show his ticket. He replied to the ticket collector, "Season," and the answer was "Show it, please." Plaintiff refused to show his ticket, which it appeared he really had with him. The collector then said he must charge him from Blackheath, but did not demand any specific sum. Plaintiff refused to pay. On the 16th March Plaintiff, before Mr. Wyndham Slade, Metropolitan Police Magistrate, was mulcted in the sum of 1s. 4d., the amount of the fare from Blackheath to Waterloo. This decision was objected to, and the Magistrate submitted the case to the Court of Queen's Bench. The Company relied upon their bye-law, as follows:—

"No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the Company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall show and deliver up his ticket (whether a contract or season ticket, or otherwise) to any duly authorised servant of the Company whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to show or deliver up as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey."

Chief Justice Cockburn said—"I have no hesitation in saying that a season ticket-holder has no exemption from the duty to produce his ticket which is reasonably imposed upon all ticket-holders. I am of opinion, first, that the bye-law is bad; secondly, that it was inapplicable, under the circumstances, to the case of the Plaintiff. As regards the validity of the bye-law, I am strongly disposed to think that such a bye-law was

ultra vires. The power to make bye-laws is given by the 108th section of the Railway Clauses Act." Justice Lush said—"The question is the validity of the bye-law upon which the Magistrate proceeded. It appears to me that the penal clause of this bye-law is *ultra vires* and void, on the ground that the penalty it imposes for refusing to show the ticket is variable and dependent on the accident of the ticket being demanded at an early or late stage of the train's journey. A passenger who has travelled only the last ten miles in a train which has travelled 100 miles is fined ten times as much as another who started at the station *a quo*, and whose ticket was demanded at the end of ten miles, although the offence of refusing to show the ticket is precisely the same in one case as the other. A bye-law which has this effect cannot be deemed a reasonable bye-law. The passenger is not only required to show his ticket when demanded—a requisition which is perfectly reasonable, and which may be enforced by a reasonable penalty—but he is required to deliver up. A season ticket is a contract by which the Company engages to carry the holder, free of any further charge, for a specified period between certain specified stations. Until that period has expired the owner is entitled to retain the ticket as his own property. He is bound to show it when required, in order that the Company's servants may see that it is still in force and that it entitles the owner to be where he is. The bye-law would in terms justify the Company in demanding it back on the first journey which the holder makes under it, though it be on the very day the ticket was purchased. The same objection applies to a single journey ticket. The holder of such a ticket is entitled to keep it till he has arrived at the station where the tickets for such a journey are collected. Our duty is to test the bye-law by established principles of law, and to regard what the bye-law authorises, and not how it is applied in practice. I do not discuss the validity of that part of the bye-law which imposes as a penalty for travelling without a ticket the whole fare from the starting point of the train. That point has already been decided by the Court of Common Pleas." Judgment against Company.—*Tried in Court of Queen's Bench, May* 28 *and July* 5, 1880.—*From Law Times Reports, vol.* 43, *page* 281.

SEASON TICKETS, AND CONDITIONS RELATING THERETO.

	Case No.		Case No.
Cleghorn v. *G. E.* (1879)	430	*Cooper* v. *L. B. & S. C.* (1879) ...	431

430. *Cleghorn* v. *Great Eastern.*—Action by Plaintiff, a season ticket-holder, for £1 deposit withheld by the Company owing to Plaintiff not returning two expired season tickets until nine days after the date of expiry, the Company holding that, by the agreement Plaintiff signed, the deposits had been forfeited. The case was tried before Mr. Besley, Deputy Judge, City of London Court, who gave a verdict for Plaintiff. On consulting counsel, an appeal was not advised, as the clause in agreement ran—"Shall be surrendered (the ticket) on its expiry," and would be construed within reasonable time. It was deemed better to amend the agreement—"The ticket to be delivered up within three days of the date of its expiry."—*Tried in April*, 1879.

431. *Cooper* v. *London Brighton and South Coast Railway Company.*—Action for 10s., deposit for a season ticket, which the Company forfeited owing to the ticket not being delivered up on the day of expiry. The ticket was issued for October, 1876, between London and Brighton. Plaintiff paid the 10s. deposit, and signed the usual conditions, among which were that the ticket must be delivered up to the Company on the day after expiry. On the ticket was a notice that in the event of its being lost a reward of 10s. would be given to any person taking it to the secretary of the Company. Plaintiff was sent a printed notice a few days before the expiry of the ticket, reminding him that if he did not wish to renew it, then the ticket should be delivered up immediately on expiry, or the deposit would be forfeited. Some few days after the expiry of the ticket Plaintiff delivered it up to the Company, and demanded his 10s. deposit, which, owing to the delay, was refused. The case was first tried in the City of London Court, and the Court found that the ticket had been delivered up in reasonable time, and gave a Judgment against the Company. The Company appealed to the Court of Exchequer, when Chief Baron

Kelly said—"The contract in this case is really very clear and plain. We cannot release the Plaintiff from any one of the stipulations to which he has agreed, or hold that the breach of any one of them will not incur the forfeiture of the deposit, without holding that every one is void; it would, in fact, go to the avoidance of the entire contract. It has been contended for Plaintiff that we are to strike these words, 'on the day of expiry,' out of the clause, and to substitute for or to add to them the words, 'within a reasonable time afterwards.' But what is a reasonable time, and who is to determine what is a reasonable time? If Plaintiff had lost his ticket and the Company paid the finder 10s., the Company would be liable in an action like the present one to pay the 10s. over again to the ticket owner. That possible consequence is, I think, conclusive as to the construction to be put upon this contract, and as to the necessity under which the Court is placed of giving effect to every word and letter of the contract literally as it is here expressed." Justice Hawkins concurred. Judgment for Company.—*Tried in Court of Exchequer, March* 28 *and April* 1, 1879.—*From Law Times Reports, vol.* 40, *page* 324.

PASSENGERS BOOKING AND THEREBY CONTRACTING TO GO TO ONE STATION, AND WILFULLY LEAVING THE TRAIN AT AN INTERMEDIATE STATION TO EVADE PAYMENT OF THE PROPER FARE.

	Case No.		Case No.
The Queen v. *Frere* (1855)	432	*G. N.* v. *Nisbet* (1864)	434
Birchell v. *M. S. J. & A.* (1861)	433		

432. *The Queen* v. *Frere.*—Action for 2s. for difference in fare. Defendant took a ticket from Norwich to Colchester for 5s., and left the train at Diss, a station short of Colchester. The distance, Norwich to Colchester, is 62¼ miles, while to Diss it is only 43¼ miles. Owing to competition passengers were being carried from Colchester to Norwich at 5s., while the fare from Colchester to Diss was 7s. The Company obtained a conviction under their bye-laws before a Magistrate, when Defendant appealed to Queen's Bench, before Lord Campbell and Justice Wightman, who quashed the conviction, holding

that the Company had no right to prevent Defendant (Mr. Frere) leaving the train at any station he thought proper. It was understood that the leaving the train was not accidental, but that it was the intention of Mr. Frere when he took the ticket at Norwich to leave the train at Diss. Lord Campbell, in giving Judgment, abstained from giving any opinion as to the power of the Company to make special regulations by which a larger fare may be charged for a shorter distance, or as to the validity of any bye-law they might make for enforcing those regulations.—*Tried January* 24, 1855.—*Jurist's Reports, vol.* 1, *page* 700; *also in law Journal.*

433. *Birchell* v. *Manchester South Junction and Altrincham Railway Company.*—Action for 1s. 7d., fare Warrington to Stretford. Plaintiff took a return ticket, Manchester to Warrington and back, for 2s. 6d. The single fare, Manchester to Warrington, was 1s. 10d., and from Warrington to Stretford (a station short of Manchester) 1s. 7d., total 3s. 5d. Thus Plaintiff, by taking the return ticket from Manchester to Warrington for 2s. 6d., and getting out at Stretford, saved 11d., which he admitted was his object. Plaintiff paid 1s. 7d. at Stretford under protest. The Company pleaded their notice on ticket—

"This ticket is only available for the places named thereon; the holder alighting at or departing from an intermediate station will have to pay the full fare."

The Company pleaded that the contract entered into having been broken, the Company were entitled to the fare to the station at which Plaintiff alighted, and quoted *East Lancashire Railway Company* v. *Bowers*, also *East Lancashire Railway Company* v. *Hartley*. After an adjournment, Plaintiff quoted *The Queen* v. *Frere* (24 Law Journal Reports, New Series, Magistrates' Cases, Case 68). The decision by Chief Justice Campbell and Justice Wightman was for Defendant, the difference between that case and the present being that the former was brought by the Railway Company against a passenger who, having booked from Colchester to Norwich, got out at Diss. Verdict for Plaintiff.—*Tried at Manchester County Court, December* 13, 1861.

434. *Great Northern Railway Company* v. *Daniel Lang Nisbet.*—Action for 16s. 3d., difference of fare between a third class ticket, London to Morpeth, and a second class fare, London to Newcastle; also 8s. 10¾d. for carriage of a 61-lbs. parcel containing merchandise, not being passenger's luggage. It appeared that by the 9.15 p.m. train, London to Scotland, passengers could book third class to Morpeth and ride in second class carriages. Defendant desired to make use of this rule to get to Newcastle, a shorter distance, at less cost—the second class from London to Newcastle by this train being 40s. 6d., while the third class fare to Morpeth was only 24s. 3d. The Company obtained leave from the Court to administer "interrogatories" to Defendant, when he admitted he had no business at Morpeth, and did not intend going there, and that the parcel carried as luggage contained merchandise. On the face of the ticket was the following notice:—

"This ticket is issued on the understanding that it is only available as a ticket to Morpeth, and not to any other station; and should the holder alight at any other station, either short of or beyond Morpeth, he or she will have to pay the full second class fare to such station from the place of starting."

Defendant told the porters at London he was going to Newcastle, and accordingly his luggage and the parcel were so labelled. At Newcastle the Defendant left the train and refused to go on to Morpeth. His luggage was detained and sent on to Morpeth, but subsequently returned to Newcastle. The Company contended Defendant, in obtaining the ticket, entered into a contract with them to travel to Morpeth, or, if he alighted at any station short, to pay the full second class fare. Defendant contended no such contract was made, as he did not read, and was not bound to read, the conditions printed on the ticket, and that he was justified in leaving the train at Newcastle. The Company quoted the cases of *Stewart* v. *London and North Western Railway* (10 L.T.R., N.S., 302), *Rumsey* v. *North Eastern Railway Company* (32 L.J.R., N.S., 244, C.P.). The Judge charged the Jury, and left it to them; but expressed the opinion that the contract, as contended for by the Company, had been made, and whether Defendant read the conditions on the ticket or not did not alter the case, and it was his own matter whether he read it or not. Jury gave verdict for

Company for both amounts.—*Tried before Baron Pigott and a Common Jury, Newcastle Summer Assizes*, 1864.—*From Railway Clearing House Reports, No.* 139, *page* 156.

PUBLISHING CONVICTIONS OF OFFENCES UNDER BYE-LAWS.

	Case No.		Case No.
Alexander v. *N. E.* (1865)	435	*Gwynn* v. *S. E.* (1868)	437
Biggs v. *G. E.* (1868)	436		

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435. *Alexander* v. *North Eastern Railway Company.*—Action for damages for libel for publishing the following notice bill :—

"*North Eastern Railway.—Caution.*—J. Alexander (meaning the Plaintiff), manufacturer and general merchant, Trafalgar Street, Leeds, was charged before the Magistrates of Darlington on the 28th September for riding in a train from Leeds for which his ticket was not available and refusing to pay the proper fare. He was convicted in the penalty of £9 1s. 10d., including costs, or three weeks' imprisonment."

It appeared that the period of imprisonment was only fourteen days. Plaintiff contended that the penalty and the costs being lumped together, and the length of the alternative imprisonment being stated larger than that really imposed, were likely to create a prejudice against him that would lead the public to believe he had been guilty of a graver offence than that with which he had in fact been charged. It was held by Chief Justice Cockburn that it was a question for the Jury whether the statement charged as libellous was or was not substantially true, and that the inaccuracy of the statement did not necessarily make it libellous. Justices Blackburn, Mellor, and Shee concurred. Judgment for Company.—*Tried in Court of Queen's Bench, April* 25, 1865.—*From Law Journal Reports, vol.* 34, *page* 152.

436. *Biggs* v. *Great Eastern Railway Company.*—Action for £500 from the Company for libel in having falsely and maliciously published the following notice :—

"*Caution.*—B. Biggs, of 3 Laurence Pountney Hill, E.C., was charged at the Ilford Petty Sessions on the 9th inst. with having travelled in a first class carriage on this railway, from Lea Bridge to London, on the 22nd ult., without first paying his fare, and he was convicted of the offence in penalty and costs

amounting to £1 2s.—By order, R. Moseley, General Manager.—Bishopsgate, November 20, 1867."

Justice Willes said—"I am of opinion the Company are entitled to our Judgment. It appears to me that the innuendo taken from the libel means no more than that the Plaintiff attempted to deprive the Company of the fare which was their right, and whether it was an honest mistake or a dishonest desire to escape payment is immaterial. If he travelled without first paying, he attempted to defraud the Company. The plea says he was convicted of that offence, and, if that be true, it is a justification of the alleged libel. This is one of those cases in which the Company has had the courage to make an example of a person who has persisted in an improper proceeding, to the detriment of honest people. Here Biggs has taken proceedings which, if successful, can only satisfy his vindictive feelings; and if our decision has the effect of discontinuing those proceedings, it will be a benefit not only to the Company, but to the Plaintiff himself." Justices Bovill and Byles concurred. Judgment for Company.—*Tried in Court of Common Pleas, June* 1, 1868.—*From Law Times Reports, vol.* 18, *page* 482; *also in Weekly Reporter, vol.* 16, *page* 908.

437. *Gwynn* v. *South Eastern Railway Company.*—Action for libel. The Plaintiff had been brought before the Lord Mayor of London with respect to travelling without a ticket between Woolwich and Cannon Street, and a fine of 1s. inflicted, or in default three days' imprisonment. The Company issued a placard at their stations in which they set forth the conviction, "or in default condemned to three days' imprisonment *with hard labour*." (The italics are ours.) The case was tried in the Court of Queen's Bench before Chief Justice Cockburn and a special Jury. The Judge, in summing up, said —"The Company has no more right to publish such placards than any ordinary man has. If you are called to account for a libel, you can say, 'I have said no more than the truth;' but if you go beyond the truth, and state what you cannot prove, then you are liable." Jury gave a verdict for £250.—*Tried in Court of Queen's Bench, July* 7, 1868.—*From Law Times Reports, vol.* 18, *page* 738.

CLOAK-ROOM CASES.

PASSENGERS' LUGGAGE LOST, DELAYED, &c.

	Case No.		Case No.
Anderson v. *N. E.* (1861)	438	*Pepper* v. *S. E.* (1868)	441
Stallard v. *G. W.* (1862)	439	*Harris* v. *G. W.* (1876)	442
Van Toll v. *S. E.* (1862)	440	*Parker* v. *S. E.* (1877)...	443

DIGEST.

In *Anderson* v. *North Eastern* (1861) a case of traveller's patterns was lost out of cloak-room, and it took fifteen days to replace them. The Company were sued as *warehousemen* for £57 for patterns, case, salary, and expenses. Chief Baron Pollock held the Company to be bailees (not exactly warehousemen), "responsible for loss to the amount of the value, but there is no undertaking to be answerable beyond the value, except by special contract." Consequential damages are not recoverable.

In *Van Toll* v. *South Eastern* (1862) a bag containing jewellery, value £20, had been, in error, delivered to a wrong person from a cloak-room, and when recovered the jewellery was missing. Chief Justice Erle held the Company did not receive the bag as warehousemen, according to the usual meaning of the word. "In a contract for bailment (taking charge) the bailee may impose whatever terms he chooses, if he gives notice of them and the bailor has the means of knowing them, and if he then chooses to make the bailment he is bound by them. . . The reasonableness of the terms is an irrelevant inquiry, the parties being at liberty to choose their own terms." The Company's notice as to parcels over £10 value was in large letters in the cloak-room, and the same notice was printed on the ticket. Judgment for Company.

In *Stallard* v. *Great Western* (1862) Plaintiff could not get his luggage out of cloak-room on a Sunday night

without forty minutes' delay, whereby he lost the train to Sheffield. Chief Justice Cockburn held—"It is no part of the terms of the contract (notice on ticket) that the luggage should *not* be given up on a Sunday; on the contrary, it is to be given up on the production of the ticket." Company held liable for damages.

In *Pepper* v. *South Eastern* (1868) luggage left at cloak-room, Folkestone, was sent to London and unreasonably delayed. The Company were held not liable, there having been no wilful act.

In *Harris* v. *Great Western* (1876) £60 was claimed for loss of a portmanteau and box accepted as left luggage and ticket issued, but deposited in the vestibule adjoining cloak-room, and from thence stolen. Judge Blackburn held the Company protected by their notice, and because the luggage, being in value over £5, was not so declared.

In *Parker* v. *South Eastern* (1877) £24 was claimed for a bag lost from Charing Cross cloak-room. Lord Bramwell, in Court of Appeal, held the Company protected by their notice, and the Plaintiff was in point of law bound by the terms (of notice); and that it would not be right, or just or reasonable, that he should be allowed to say that he was not aware of the conditions because he had not read them. He was of opinion that if the Plaintiff knew there was printed matter on the ticket he was as much bound by the terms it contained as if he had read them, or as if the porter had called his attention to them.

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438. *Anderson* v. *North Eastern Railway Company.*—Action for £57 10s. for loss of a traveller's case of patterns from the Newcastle-on-Tyne left luggage office. The station-master at the time admitted the loss, and advised Plaintiff to order a fresh case of patterns, which took fifteen days to get. Plaintiff's claim was £20 for patterns, £6 for case, £31 10s. salary and expenses during fifteen days' delay. The case was first tried at Liverpool before Justice Keating, when the

Jury found for the Company, the Judge directing them not to take into account any damage incidentally or collaterally resulting from the loss beyond the actual value of the case.

Plaintiff appealed to the Court of Exchequer, when Chief Baron Pollock said—"The Judgment must be for the Company. The Plaintiff sued the Company as warehousemen, not as carriers. There is a great difference between a warehouseman and a carrier. Where a carrier is employed, it is known and must be assumed that the goods are going for some purpose, and so far it is notice which may render the carrier responsible for damages resulting from loss of the goods 'beyond their actual value;' but the simply depositing a parcel at a warehouseman's till to-morrow cannot be notice which shall affect the warehouseman, in case of the loss of the parcel, beyond the actual value of the article. He is responsible for loss to the amount of the value, but there is no undertaking to be answerable beyond the value, except by special contract." Baron Martin concurred. Baron Bramwell said—"There would be no possibility of defining their responsibility if we were to hold that their liability varied with the consequences collaterally resulting from the loss of such parcels." Judgment for £20 only.—*Tried in Court of Exchequer, April* 17, 1861.—*From Law Times Reports, vol.* 4, *page* 216.

439. *Stallard* v. *Great Western Railway Company.*—Action for £50 damages, arising from delay to Plaintiff getting his luggage from cloak-room on a Sunday night, whereby he missed the train to Sheffield and his Monday's market. Plaintiff left a case of patterns, on his arrival at Paddington on the Saturday evening, in the up platform cloak-room. He paid 2d., and received the usual ticket. On the Sunday, at 8.30 p.m., he went to the cloak-room and found it closed, and owing to inquiries and hunting up the inspector, forty minutes were occupied, whereby he lost both Sheffield trains by London and North Western and by Great Northern Railways that night. The case was first tried before Justice Blackburn, London Sittings after Hilary Term. The Jury gave a verdict for 40s., and leave was given to appeal. On the appeal case Chief Justice Cockburn said—"I am of opinion that the verdict should

stand. It is no part of the terms of the contract (notice on ticket) that the case should not be given up on a Sunday; on the contrary, it is to be given up *on the production of the ticket.* But for the technical rule arising from the small amount of damages, I should have been inclined to have granted a new trial on the ground that the verdict was against the weight of evidence." Justice Crompton said—"The rule (for a new trial) is asked for on the ground that there was no evidence for the Jury of unreasonable delay. There certainly was evidence. By this ticket the Company agree to keep articles until they are wanted, and they might naturally expect that when deposited on a Saturday the goods might be wanted for some Sunday train. It is a question of fact for the Jury whether the case was, when demanded, delivered in reasonable time. The Company contend they are not bound to open the cloak-room on a Sunday, but it is notorious people do travel on a Sunday. The Company's practice in keeping the cloak-room open differently on Sundays to other days makes no difference *unless notice to this effect had been inserted on the ticket.* The Plaintiff was misled if, without any notice to the contrary, he tried to get his property and could not succeed for forty or fifty minutes." Justices Blackburn and Mellor concurred.—*Tried in Court of Queen's Bench, April* 16, 1862.—*From Law Journal Reports, vol.* 31, *page* 137. (Reported in *Law Times* as "Stanner," not "Stallard," vol. 6, page 217.)

440. *Van Toll* v. *South Eastern Railway Company.*—Action for £20 for jewellery abstracted from a lady's bag left in the cloak-room at the London Bridge Station, 6th August, 1861. Plaintiff, on leaving the bag, paid 2d., and received a ticket with the following notice printed at the back:—

"The Company will not be responsible for articles left by passengers at the station unless the same be duly registered, for which a charge of 2d. per article will be made and a ticket given in exchange, and no article will be given up without the production of the ticket or satisfactory evidence of the ownership being adduced. A charge of a penny per diem, in addition, will be made on all articles left in the cloak-room for a longer period than twenty-four hours. The Company will not be responsible for any package exceeding the value of £10."

On Plaintiff applying for the bag, it could not be found. Ultimately it was traced as having been delivered by mistake

to another person. On its recovery a great part of the jewellery it had contained was missing. The case was first tried at the Middlesex Sittings after Michaelmas, before Chief Justice Erle, and the Jury gave a verdict for £20. The Judge gave leave to appeal, and the Court to be at liberty to draw such inferences of fact as a Jury might. On the appeal case Chief Justice Erle said—"In this case the declaration was upon a contract to keep safely and return on demand. The Company had placed a notice in large letters in the cloak-room, which all resorting to might see and read if they chose, and also printed the same notice on the ticket delivered to Plaintiff. Plaintiff stated she did not see the large notice, but was not asked whether she read the ticket. The Jury found as one issue that the jewellery had been stolen. Plaintiff contends that the deposit of the bag brings the case under the Railway Traffic Act, 17 & 18 Vic., cap. 31, sec. 7, which regulates the terms a railway company may make for receiving, forwarding, and delivering goods. We are of opinion the Company did not receive the bag in the capacity of carriers to forward, and that the statute has no application. The Company did not receive the bag as warehousemen, according to the usual meaning of the word. In a contract for bailment the bailee may impose whatever terms he chooses, if he gives notice of them and the bailor has the means of knowing them, and if he then chooses to make the bailment he is bound by them. Here there is no carrier's contract; the Company are at liberty to make any contract they please; and where the question is what were the terms of the bailment so made, the reasonableness of the terms is an irrelevant inquiry, the parties being at liberty to choose their own terms. I still beg to adhere to this, that, considering the nature of the accommodation, the condition appears to me very reasonable. If valuable goods are deposited where so much freedom of circulation is essential, the danger of dishonesty would be great; and if an action would lie for £20 or £30 worth of jewellery, it might lie for any sum." Justices Willes, Byles, and Keating concurred. Verdict for Company.—*Tried in Court of Common Pleas, April* 17, 1862.—*From Law Journal Reports, vol.* 31, *page* 241.

441. *Pepper* v. *South Eastern Railway.*—Action for delay to a trunk of luggage deposited at Folkestone left luggage office, and sent thence in mistake to Charing Cross, London, where, after a long and unreasonable delay, it was recovered by Plaintiff. It was held—"Where an article deposited in the cloak-room of a railway company exceeds £10 in value, a notice on the ticket given to the depositor that 'the Company will not be responsible for any package exceeding the value of £10,' protects the Company from liability, not only for the loss of such an article, *but also for delay in delivering it, at least where the delay is caused by no wilful act or default of the Company, and without their privity and knowledge.*"—*Tried in Court of Queen's Bench, January* 17, 1868.—*From Law Times Reports, vol.* 17, *page* 469.

442. *Harris* v. *Great Western Railway.*—Action for £60 for value of a portmanteau and box deposited at the cloak-room, Paddington. The Plaintiff, a lady, arrived at Paddington, and her relative deposited the luggage on her behalf with the Company's servants as left luggage. Cloak-room labels were put on the packages and the usual ticket issued, and 4d. paid. The two articles were left in the vestibule adjacent to the cloak-room. It appeared this vestibule was accessible to passengers, and it seems some thief, before the articles were removed into the cloak-room, abstracted the labels, and then, with cool impudence, called one of the Company's policemen to remove the articles, which he did, and they were taken away. The thief, however, was convicted, and part of the property recovered. The case was first tried before Baron Pollock without a Jury. The Company contended that by the conditions at the back of the ticket they were not liable for packages over £5 in value unless so declared, and in this case no declaration was made. The Judge, however, found against the Company £60 damages, with leave to appeal, and the Appeal Court to draw inferences of facts. The two questions discussed were whether Plaintiff was under the circumstances bound by the terms of the notice on the ticket; and, secondly, whether, on the true construction of those terms, they protected the Company from liability for loss arising as this did. Judge Blackburn, on the

appeal case, came to the conclusion that both these questions should be answered in favour of the Company, and Judgment must therefore be for the Company. He said—"The ticket has on the face of it a plain and unequivocal reference to the conditions printed on the back of it, and any person who read that reference could without difficulty look at the back and see what those conditions were. If I could agree with my brother Lush that the meaning of the contract is that the Company are to place the luggage in some separate warehouse to which none but the Company or their servants had access, so that the placing of them in the vestibule was a breach of contract, I should be inclined to agree in thinking that the Defendants are liable to make good the loss arising from that breach of contract. I do not think that depositing the luggage in the vestibule would have been any breach of contract if the Company had taken reasonable precautions to protect the luggage whilst placed in the vestibule from danger, as, for instance, by leaving a competent person to stand sentry over them till it was convenient to remove them to a more secure place. They would, if the parcels were under £5 value, be, in my opinion, liable, not because they were placed in the vestibule, but because they took no care of them when there. I read the contract as being to take reasonable care of the luggage, and to be responsible for any loss occasioned by that want of care, with, in effect, a proviso that, inasmuch as the remuneration is very small and the loss may be very great, the Company shall not be responsible for loss if the goods exceed £5 in value, unless the value is declared and paid for. So construed, the condition protects the Company in the present case." Justice Mellor concurred. Justice Lush dissented. Judgment for Company.—*Tried in Court of Queen's Bench, April* 26 *and May* 30, 1876.—*From Law Journal Reports, vol.* 45, *page* 729; *also Law Times Reports, vol.* 34, *page* 647.

443. *Parker* v. *South Eastern Railway Company; also Gabell* v. *Same.*—Action for £24 10s. for a bag deposited at left luggage room, Charing Cross. On the back of the ticket given Plaintiff as a receipt for the fee was the usual notice that the Company would not be liable for the value of any

package over £10. On front of the ticket was printed "See back." The case was first tried at Westminster before Baron Pollock and a common Jury. The Judge left two points to the Jury—(1) Did the Plaintiff read, or was he aware of, the special terms of the contract? and (2) whether the Plaintiff ought, under the circumstances of the case, having used proper caution, to have read or been aware of those terms? The Jury found both these questions in favour of Plaintiff, and gave him a verdict accordingly. The Company appealed, when Lord Coleridge said—"I am of opinion the Company are liable. The question turns upon certain elementary propositions as to the law of contract, qualified by some of the decisions which have been cited. It has been contended, first, that there is no contract; but the acts of the parties furnish the evidence of the contract. The Plaintiff gives the Company his package; they charge 2d., and upon this hypothesis they give a paper containing conditions, *none of which are brought to the knowledge of the Plaintiff;* and it seems impossible to say that, if there are conditions which form the basis of a contract, there is no contract. It seems the ordinary contract to take care of the package. In the case of a sale, when the vendor hands to the purchaser a document containing the conditions of the sale, the purchaser must be taken to be aware of those conditions; then, although he might satisfy a Jury that he never read the conditions of sale, the answer would be—'You had the opportunity, and the vendor has a right to assume you read them, and you must be taken to have done so.'"

Justice Lindley said—"I am of the same opinion, the Company is liable. If there is any contract, it is either on ordinary bailment or a contract as shown on the back of the ticket. The Jury have found that it is not the contract on the back of the ticket, and therefore it is an ordinary contract. It is said there is no contract at all, because the Company took the goods on terms which the Plaintiff did not consent to; and, looking at the findings of the Jury, my view is that the Company took the goods without notice of any other contract than that of ordinary bailees. The case of *Henderson* v. *Stevenson* (Law Reports, 2 Scotch App., 470) applies in this case." Judgment against the Company.—*Tried in Court of*

Common Pleas, April 29 *and May* 1, 1876.—*From Law Journal Reports, vol.* 45, *page* 515.

The case was taken to the Court of Appeal, when it was argued before Lord Justices Mellish, Bramwell, and Baggallay, who took time to consider Judgment, which was now given.

Lord Bramwell gave the Judgment of the Court that there must be a new trial. He held that there had been misdirection in the Court below, and that the verdict was against the evidence. He said it was a question of law, and not of fact. It was clear that if Plaintiff had read the conditions and had not objected, he would have been bound by them, and no point could have been made that the contract was completed before the ticket was delivered to him. So if he had been told that the terms were on the back of the ticket; so if he knew of them —that is, knew the terms were there, though he did not read them; and it was admitted that he knew there was printed matter on the back of the ticket, and did not pretend that he did not believe it had to do with the matter, and only said that he did not know that it contained the terms and conditions of the contract. That being so, he was of opinion that the Plaintiff was, in point of law, bound by the terms, and that it would not be right, or just or reasonable, that he should be allowed to say that he was not aware of the conditions because he had not read them. He was of opinion that if the Plaintiff knew there was printed matter on the ticket he was as much bound by the terms it contained as if he had read them, or as if the porter had called his attention to them. He thought there had been a misdirection, and that the right question had not been left to the Jury. The question put to the Jury was whether the Plaintiff was under any obligation to read or make himself aware of the terms of the ticket, but that was equivocal. Obligation to whom? To himself? Then he might excuse himself from such obligation. He (the Judge) thought the case differed from that of *Henderson* v. *Stevenson*, decided in the House of Lords.

Justice Mellish's Judgment was read. He thought the question was one of fact, and that the right question had not been left to the Jury; hence, he thought, there should be a new trial.

Justice Baggallay's Judgment was also read. He thought the form in which the question had been left to the Jury was not strictly correct. He held that if the practice of indorsing such terms on the ticket was general, and was known, no doubt the parties would be bound by them. But no such practice had been shown to exist, nor did he judicially know of its existence; and the primary object of the ticket might well be supposed to be that they should be held as vouchers for the goods deposited. He agreed to a new trial.—*Tried at Court of Appeal, London, April* 25, 1877.—*From Railway News, April* 28, 1877.—*See Law Journal Reports, vol.* 46, *page* 768.

PASSENGERS' LUGGAGE.

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,,	*Lost at Junctions and Joint Stations during Transference from one Company to another Company*	756
,,	*In respect to the Right of Suing for Lost Luggage belonging to a Servant when his Master Travelled with him and Paid his (Servant's) Fare*	758
,,	*Articles Found in a Railway Carriage belong to the Finder in the absence of the Rightful Owner Claiming them* ...	759
,,	*Articles Lost or Stolen out of Carriages* ...	760

RAILWAY COMPANIES ARE COMMON CARRIERS OF PASSENGERS' LUGGAGE, AND WITHIN SECTION 7 OF RAILWAY AND CANAL ACT, BY LAND AND SEA.

	Case No.		Case No.
Macrow v. *G. W.* (1871)	466	*Cohen* v. *S. E.* (1877)	473

PASSENGERS' LUGGAGE—GENERAL.

	Case No.		Case No.
G. W. v. *Goodman* (1852)	444	*Naghten* v. *Mid. G. W.* (1858) ...	446
Turner v. *Midland* (1854)	445	*Stevenson* v. *L. & N. W.* (1867)...	448
M'Kenna v. *C. & H.* (1858) ...	446	*Henderson* v. *Stevenson* (1875) ...	447

444. *Great Western Railway Company* v. *Goodman.*—Action for £35 14s. for a trunk of passengers' luggage, London (Paddington) to West Drayton. Plaintiff gave her luggage in charge of a porter on her arrival at the station, and saw labels put on it. On arrival at West Drayton she received two packages, but the trunk was never delivered, and it was admitted that it had been stolen. The Company contended that the following bye-law exempted them from liability :—

"Every first class passenger will be allowed 112 lbs., and every second class passenger 56 lbs., of luggage free of charge; but the Company will not be responsible for the care of the same unless booked and paid for accordingly."

No evidence was given on the part of the Company of any arrangement being made by them for booking the luggage of passengers. The Company contended (1) that the trunk had never been delivered in fact into the custody of the Company so as to make them liable for it; (2) that the Company are absolved from the liability by their bye-laws. The case was first tried in the County Court of Marylebone, Middlesex, when a verdict was given for the Plaintiff. The Company appealed. Justice Maule said—"Independently of the bye-law the Company would have been liable. The Plaintiff pays for her ticket and delivers her luggage to the porter. That makes the Company liable at common law. Can it be said that the bye-law has any effect when the Plaintiff had no knowledge of it? Is it competent for the Company by a bye-

law to repeal their common law liability as carriers? The proper effect of this bye-law would be to give the directors power to make contracts restricting the Company's liability in respect of luggage, but they do not seem to have proceeded on it. It has been treated as a dead letter." Judgment for Plaintiff. Justice Cresswell said—"The case does not show that the Company have any proper office for booking luggage under the bye-law." Justices Cresswell, Williams, and Talfourd concurred.—*Tried in Court of Common Pleas, May* 11, 1852.—*From Law Journal Reports, vol.* 21, *page* 197.

445. *Turner* v. *Midland Railway.*—Action for loss of a commercial traveller's luggage. Plaintiff arrived at Derby Station just too late for the 11 a.m. Birmingham train. He had been drinking. He went away from the station, and left his luggage on a stand on the platform where the omnibus man had put it. He returned for 2 p.m. train intoxicated, and had to be assisted into a carriage. He made a claim for the lost luggage, and brought an action in the Queen's Bench, which was tried, December, 1853, before Chief Justice Lord Campbell. In spite of the Judge summing up strongly in favour of the Company, the Jury gave a verdict for £15 damages. The Company moved for a new trial, which was refused, from the amount being under £20, and because of a technical rule which the Company did not take themselves out of by showing the verdict to have been a *perverse* one.—*Motion for new trial before Lord Campbell and Justice Coleridge, February*, 1854.—*Superintendents' Minutes, Railway Clearing House, Feb.* 21, 1854.

446. *M'Kenna* v. *Chester and Holyhead Railway.*—Action for the loss of a portmanteau, passenger's luggage, for which £300 was claimed. The Company claimed, under the Common Law Procedure Act, 1856, section 56, to deliver to Plaintiff certain interrogatories as to the contents of the portmanteau, which was said to contain ten suits of clothes, twenty shirts, &c. Baron Richards, following the case of *Sharp* v. *Glasgow and South Western Railway Company* (Queen's Bench Chamber, 3rd April, 1857), made the following order:—"That the Defendants be at liberty to deliver to the Plaintiff, or his attorney, the said interrogatories in writing; and that the Plaintiff do, within ten days after service of this rule and of

the said interrogatories, answer the questions in writing, by affidavit, to be sworn and filed in the ordinary way."—*Tried in the Consolidated Chamber, November* 30, 1858.—*From Irish Common Law Reports, vol.* 8, *Appendix, page* 26.

A similar case is also reported in same volume, Appendix, 55—*Naghten* v. *Midland Great Western Railway Company.*

447. *Henderson (Steam Company)* v. *Stevenson.*—Action for £71 for loss of passenger's luggage in steamer "Countess of Eglinton," Dublin to Whitehaven, wrecked off Isle of Man. Plaintiff purchased a ticket, at the back of which was printed—

"The Company incurs no liability in respect of loss, injury, or delay to the passenger or to his luggage, whether arising from the act, neglect, or default of the Company or their servants, or otherwise. It is also issued subject to all the conditions and arrangements published by the Company."

Plaintiff's action was brought 19th June, 1872, before the Lord Ordinary (Lord Gifford), when he obtained a verdict. An appeal was tried at the Court of Session, and decision adhered to. The case was then brought before the House of Lords, and Judgment given by the Lord Chancellor and Lords Chelmsford, Hatherley, and O'Hagan. It appeared that in the two previous trials it had been held in each case that there had been negligence on the Company's part in the loss of the vessel, which took away the Company's plea that the vessel was stranded by an accident of the sea. Thus, negligence having been proved, the trial in the Lords turned upon the point of the notice at back of the ticket. Plaintiff swore he never read the notice at back of the ticket. The Company's managing director was asked if he gave any instructions to the clerk who issued tickets to call attention to the notice at back of same. He answered, "No." The clerk said "he was not in the way of drawing the attention of passengers to the condition on the back of the ticket, nor to the notice on time-bills." The Lord Chancellor held that it would be extremely dangerous to hold that where a document is complete on the face of it, but having on the back of it something which has not been brought to the knowledge of a contracting party, he should be held to have assented to that which he has not seen and of which he knows nothing. There was nothing *on the face of the ticket referring*

Plaintiff to the back. Lord Chelmsford said—"It may be a question whether, if a passenger read the indorsement (on the ticket) and declined to agree to the terms, the Company could refuse to take him as a passenger. Holding themselves out as undertaking to convey passengers by their vessels, it might be held that they were bound to carry upon the terms of their common law liability alone, unless the passenger (chose) to enter into a special contract." Lord Hatherley said a ticket was nothing more than a receipt for the money paid. Lord O'Hagan—"When a company desires to impose special and stringent terms upon its customers, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted." The appeal was dismissed with costs.—*Tried in House of Lords, June* 4, 1875.—*Law Reports, Scotch and Divorce Appeal Cases, vol.* 2, *page* 470.

448. *Stevenson* v. *London and North Western Railway Company.*—Action for loss of passenger's trunk from Londonderry, *via* Belfast and Fleetwood, to Birmingham. It appeared Plaintiff took a through ticket from Londonderry to Birmingham at the office of the Northern Counties Railway Company at Londonderry, and on the back of the ticket was printed—

"This ticket, so far as regards any distance beyond the limit of the line of the Londonderry and Coleraine Company, is issued by them as the agent only of other companies, and they will not be responsible for the safe carriage of any passenger, or of any articles accompanying such passenger, beyond the said limit."

The Plaintiff sued the London and North Western Company, who allowed the Plaintiff to travel on their line by virtue of this ticket, but it was sworn that the railway company which had issued the ticket had no authority to contract on their behalf. The Plaintiff had lost his luggage on the line of the English Company, which had an agent in Dublin. The Court ordered service on the English Company to be substituted by service on their agent in Dublin, and Chief Justice Monahan said the Company would find it very difficult at the trial to persuade a Jury they did not adopt the act of the party professing to be their agent. "For the purpose of this motion we assume they did, and accordingly make absolute the order."—*Tried in the Court of Common Pleas,* 1867.—*From Irish Reports, Common Law, vol.* 1, *page* 692.

DEPARTURE.

Luggage Lost off Platforms at Commencement of Journey, when the Question of Acceptance by Company Arises.

	Case No.		Case No.
Munster v. *S. E.* (1858)	449	*Lovell* v. *L. C. & D.* (1876) ...	452
Agrell v. *L. & N. W.* (1875) ...	450	*Cohen* v. *S. E.* (1877)...	473
Leach v. *S. E.* (1876)...	451	*Bergheim* v. *G. E.* (1878)	453

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449. *Munster* v. *South Eastern Railway Company.*—Action for damages owing to the Company refusing to carry passenger's wearing apparel, as follows :—

December 10, 1856.—One shawl package containing a book slide, a silk coat wrapped in a maud or shawl and fastened by a leather strap, and under the strap two pots of cocoa.

December 12, 1856.—One parcel, strapped and sealed up, containing wearing apparel, two books, and some newspapers.

December 17, 1856.—One shawl package containing wearing apparel.

February 7, 1857.—One shawl package containing wearing apparel.

In all cases, except the first, the parcels were addressed in Plaintiff's name to Tunbridge Wells. The Company had a regulation that shawls should not be labelled and put in the van. The porters on each occasion refused to label the shawl parcels and put them into the van, but offered to put them into the first class carriage in which Plaintiff travelled, and to put them under the seat for him. This the Plaintiff did not wish, and told the porter and station-master in each case they might put the parcel where they liked, but he would not take charge of it. His reason for this was that in December, 1855, when travelling by the same train (the Dover train), which was usually very long, he had to leave his carriage without its reaching the platform. It was a dark, wet night ; he had several parcels in the carriage with him, and he got out at an unlighted spot between two platforms ; there were no porters, and in struggling with his parcels he nearly broke his neck in getting to the platform. In each case the parcels were left on the platform at London, and after the train left were treated as "unclaimed" luggage. When

Plaintiff applied for the parcels, he was asked to pay 6d. under the following published bye-law:—

"All unclaimed property found on the Company's premises or in their carriages is deposited at the lost property office at the London Bridge terminus. If there be an address on the articles found, notice will be sent to that address that the property is in the Company's possession; and if there be no address thereon, the packages will be opened at the expiration of one week with a view to ascertain the address of the owner, when notice will be forwarded to him; and the property will in either case be restored to the owner on payment of a fee of 6d. for each article, or forwarded, if desired, at the usual parcels rates. An additional charge of 6d. per week is made after the expiration of the first week on each article left for a longer period."

The Plaintiff refused, and relied on section 131 of the Company's Act, 6 Will. 4, cap. 75, as follows:—

"And be it further enacted, that without extra charges it shall be lawful for every passenger travelling upon or along the said railway to take with him his articles of clothing, not exceeding 40 lbs. in weight and 4 cubic feet in dimensions; and the said Company shall in no case be in any way liable or responsible for the safe carriage or custody of, or for any loss of or injury to, any articles, matters, or things whatsoever carried upon or along the said railway with or accompanying the person of or belonging to any passenger, or delivered for the purpose of being carried, other than and except such passenger's articles of clothing not exceeding the weight and dimensions aforesaid: provided always that nothing herein contained shall in any case extend, or be deemed or construed to extend, to charge or make liable the said Company further or in any other case than where, according to the laws of this realm for the time being, stage-coach proprietors and common carriers would be liable; nor shall anything herein contained extend, or be deemed or construed to extend, in any degree to deprive the said Company of any protection or privilege which, either now or at any time hereafter, common carriers or stage-coach proprietors have or may have, but the said Company shall from time to time and at all times have and be entitled to the benefit of every such protection and privilege."

The Court were in some doubt as to the first two parcels, from their not consisting entirely of wearing apparel. The Plaintiff then gave up those two cases, and Judgment was delivered by Chief Justice Cockburn, who said—"The question in dispute between Plaintiff and the Company's servants was who should be responsible for the carriage of these parcels. The Act of Parliament renders it imperative on the Company to carry a certain weight of passenger's luggage. The Company are empowered to make regulations, and by one the Company say they will not be responsible for luggage that is not marked with their label and properly addressed. The

Plaintiff calls upon them to label his parcels. This they refuse to do. It is impossible not to see that the question was whether the Company, by so refusing to label, could divest themselves of the common law liability which attached to them as carriers. The Plaintiff objects to the parcels being placed in the carriage on the ground that the Company are thereby endeavouring to relieve themselves from their liability as common carriers. This was the struggle. I think the porter was not justified in taking the parcel to the lost luggage office. All Plaintiff said amounted to this, that if they put the parcel in the carriage with him they were not to construe that as a consent on his part to their not being responsible for it. There was nothing to relieve the Company of being common carriers, and the act of their porter in taking the parcel to the lost luggage office was a wrongful act, for which they are liable, whether it be on the count in trover or on the special count for refusing to carry. These articles were wearing apparel; the Company were liable to carry them, and they might put them in any part of the train, either in the carriage with Plaintiff or where else they pleased." Justice Williams said—"There may, no doubt, be cases where articles of this description may be so carelessly and improperly packed as reasonably to justify a refusal on the part of the Company to accept them. But it does not follow that they would be justified in rejecting every package which may be imperfectly packed." Justices Willes and Byles concurred. Verdict, £10 against the Company.—*Tried in Court of Common Pleas, May* 26 *and* 27, 1858.—*From Law Journal Reports, vol.* 27, *page* 308, *C.P.*

450. *Agrell* v. *London and North Western Railway Company.*—Action for £60 for value of a portmanteau lost at Victoria Station, Manchester. On 6th February, 1875, Plaintiff, a commercial traveller, drove to the Victoria Station at 12.20 p.m. to go to Hull by the 12.45 p.m. train. A railway porter at the entrance door took the portmanteau, and Plaintiff, with a friend who was with him, walked with the porter on to the platform. The porter put down the portmanteau near the rack where the luggage labels were deposited. The porter

then left, and the Plaintiff, after standing a short time with his friend by the portmanteau, and failing to obtain the services of another porter, himself took a Hull label from the rack and put it on his portmanteau. After again trying to get a porter, but without success, Plaintiff and his friend went into the refreshment room for ten or fifteen minutes, and when he returned the portmanteau was gone. Within two yards of the place where the portmanteau rested was a notice—

"The Company will not be responsible for articles left at the station unless deposited in the cloak-room and a fee of 2d. paid on each article."

The case was tried in the Court of Exchequer, when Chief Baron Kelly and Baron Amphlett held the Company liable, while Baron Pollock dissented. On appeal to the Exchequer Chamber, the ruling of Baron Pollock was confirmed, and Judgment given for the Company. The case was not reported, but the following is taken from Baron Pollock's written Judgment:—

Baron Pollock said—"Under these circumstances I am of opinion that the Plaintiff's portmanteau was never in the custody of the Company as carriers. No act of negligence on part of the Company was proved, and if it was negligent of the outside porter who placed the portmanteau on the platform to leave it there unguarded, the Plaintiff was aware of this, and might have averted all risk by staying by his portmanteau until it was properly labelled and under the charge of a porter. The liability of the Company is that of a common carrier, and when once the luggage is delivered to the Company and received by them to be carried, this liability extends, not merely to the actual transit on the line, but to the period when the luggage is being taken to or from any vehicle by which a passenger comes to or leaves the station of arrival or departure; and the only question in the present case is, Had the Company ever so received the portmanteau? The Company are not liable, because Plaintiff affixed a Hull label to the portmanteau himself. No evidence was given as to the duty of the outside porter, but I think it may be fairly assumed that in the absence of any instructions his duty was to relieve Plaintiff from the burden of carrying his portmanteau into the station, and that he had performed it when he accompanied the Plaintiff and placed his portmanteau

near the spot where the luggage is labelled. It cannot be contended that he ought to have deserted his post outside the station and kept watch over it during the ten or fifteen minutes the Plaintiff was taking his refreshment, and he could not hand it over to another porter to put in the train, because the Plaintiff had not told him what was its destination. To hold that, where nothing is said on either side, because a porter takes a portmanteau from a cab he becomes charged with it, so as to make his employers, from that moment, common carriers of it, and liable as such—although the owner of it has taken no ticket, declared no destination, promised no payment, neither given nor undertaken to give any lien, so as to create the correlative right of the carrier, and may have come to the station only to deposit his luggage in the left luggage office—would seem to me to be not only making a contract which was never made, but imposing upon railway companies a burden beyond what has hitherto fallen to common carriers. It is true that a very few words, or possibly a single word on either side, might have made all the difference. Had the Plaintiff, on arriving, said, 'Hull,' and the porter answered, 'All right,' and then taken the portmanteau, there would have been good grounds for contending that the porter had accepted the duty of seeing it started for Hull. Plaintiff called for an inside porter to look after the portmanteau, showing thereby that he knew it had not been delivered over for carriage. The duty of the Company as common carriers would be founded on the contract entered into between them and the Plaintiff, which would not be complete until the Plaintiff had taken his ticket; but this would not, in my judgment, prevent their liability attaching at an earlier time if it could once be shown that they had accepted the portmanteau for transit now. Although Plaintiff arrived at the station twenty-five minutes before the train started, he would, I think, have been entitled to deliver over the portmanteau to a proper officer of the Company, with directions to put it in transit for Hull. The existence, however, of the cloakroom and notice have some bearing on the question, as showing, *inter alia*, that the delivery to the outside porter did not necessarily and exclusively create a contract to carry."—*Tried in Court of Exchequer, Easter Term*, 1875.—*From Law Times Reports, vol.* 34, *page* 134.

451. *Leach* v. *South Eastern Railway Company.*—Action for value of a travelling bag. Plaintiff, 28th July, 1875, drove up to Cannon Street Station at 4.30 p.m., to go to Woolwich by the 4.40 p.m. train. A railway porter said, "Where are you going?" Plaintiff replied, "Woolwich," and gave the porter his bag. Together they walked on to the platform. The porter then put the bag down close to Plaintiff, and, calling to another porter, said, "Woolwich." Plaintiff then said, "I do not want it labelled; I will have it in the carriage with me." The porter went away suddenly, leaving the bag on the platform. The Plaintiff then went and got his ticket, and on his coming back the bag was gone. The case was first tried in the Bloomsbury County Court, when Plaintiff was non-suited. Plaintiff appealed, and on the appeal case Justice Grove said—"I have reluctantly come to the conclusion that there was some evidence to go to a Jury. I base my Judgment on the case of *Agrell* v. *London and North Western Railway.* There the Court of Exchequer and the Exchequer Chamber assumed that there was some evidence to go to the Jury; but the case having been left to them to decide what was the reasonable inference to be drawn from the facts, the majority of the Judges came to the conclusion that the bailment was only a bailment to place the luggage on the platform, and not to see it into the train. In that case the Court had power to draw inferences of fact, but we have no such power in this case. In *Agrell's Case* the passenger arrived a long time before the train left, and did not mention the place he was going to; whereas here the arrival of the passenger was only shortly before the train started, and the servants of the Company well understood the passenger was going by train, and told his destination, viz., Woolwich. The only fact which tells against the Plaintiff was, that when his luggage was put down beside the other baggage he said, 'I don't want it labelled; I'll take it in the carriage with me.' That expression, to my mind, was an ambiguous one. It may mean 'You need not label it, but put it into the carriage;' or it may mean 'I will take the custody of it myself.' I have great doubt as to whether, on seeing the porter going off without anybody being left in charge, the Plaintiff acted

reasonably in going away as he did. All these, however, are matters of inference, and we have no power to draw any inference. I confess that if we had the same power as the Court had in *Agrell's Case*, I should find for the Company. As it is, I feel bound to hold that the non-suit is wrong and must be set aside, and consequently there must be a new trial." Justice Quain concurred. Judgment against Company.—*Tried in Court of Appeal, February* 19, 1876.—*From Law Times Reports, vol.* 34, *page* 134.

452. *Lovell* v. *London Chatham and Dover Railway Company.*—Action for £40 for a despatch-box, passenger's luggage. Plaintiff, a lady, arrived in a cab with her luggage at Victoria Station, intending to catch a train for Broadstairs at 2.50 p.m. There was no train at that time, nor until 3.13 p.m., 23 minutes later. A Company's porter met the cab at the station entrance, and put the luggage on a truck, and said if Plaintiff would get her ticket he would label the luggage, and that the ticket office would be open in two minutes. The ticket office was opened in two minutes, and Plaintiff obtained her ticket, and went on the platform to her luggage, when she found the despatch-box gone. The Company had the following notice placed in conspicuous positions about the station :—

"The attention of the public is particularly requested to the risk they incur by leaving luggage, parcels, coats, and wrappers, or any other property, in the offices or waiting-rooms at the stations. The Company's servants are strictly forbidden to take charge of any articles, and are subject to dismissal for so doing. Any article which a passenger wishes to leave at a station should be deposited in the cloak-room, where a proper ticket will be given to the owner on payment of the usual booking fee. The directors give notice that they will not be responsible for any article left on their premises in any other manner. Passengers must see their luggage labelled, or it will not be put in the train."

The case was first tried before Baron Pollock, and a verdict for £40 given, with leave to appeal to set aside the verdict or to reduce it to £25, owing to some of the contents of the despatch-box coming within the Carriers' Act.

On the appeal case Justice Blackburn said—"The question is, Had the porter received the luggage as the servant of the Company, and at the commencement of the journey? I think that he had. I do not see how any railway company could

carry on its business as a carrier of passengers if this is not to be considered as the beginning of the journey. The Railway Company have said, as they are entitled to say, that luggage is not to be deposited at their risk except in accordance with the conditions they impose, and on payment of a fee; but they do not refer to a case of this kind, and though luggage is not to be deposited, it must be kept by the Company's servants while the passenger gets his ticket. It has been agreed to let £10 represent the value of the unprotected articles in the despatch-box, and the box was valued at £15. The Judgment of the Court will therefore be to reduce the verdict to £25." Justice Lush concurred.—*Tried in Court of Queen's Bench, February* 7, 1876.—*From Law Journal Reports, vol.* 45, *page* 476.

453. *Bergheim* v. *Great Eastern Railway Company.*—Action for loss of a travelling bag, London to Yarmouth. Plaintiff arrived at the Shoreditch Station a considerable time before the train started. He directed a porter to put his bag on the seat of a carriage. The porter, in reply to a question, said the bag would be safe, and that he should be there himself until the train started. Plaintiff went to the refreshment room, and on his return the bag had been stolen. The case was first tried before Justice Manisty, and the Jury found (1) that the carriage was a proper place in which to put the bag; (2) that the porter was acting in the scope of his employment in putting the bag into the carriage; (3) that the porter received the bag as the Company's servant; (4) that no felony had been committed by the Company's servants; (5) that neither Plaintiff nor the Company had been guilty of negligence. The Judge, on these findings, directed Judgment for the Company. Plaintiff appealed. On the appeal case Lord Justice Cotton gave a written Judgment—"It has been found that neither the Company nor the Plaintiff was guilty of negligence. The Company therefore cannot be held liable unless they are to be held to have undertaken the liability of common carriers in respect of the bag. A common carrier is answerable for the loss of the goods entrusted to him as such, though the loss be in no way caused by any default on his part. He is considered as having contracted to insure—that is to say, to carry and deliver safely

and securely the goods. The reason why the law implies that this is the contract of a common carrier is that the carrier and his servants during carriage have exclusive control and care of the goods; and the law, in order to prevent frauds, imposes upon those who contract to carry goods as common carriers the obligation to undertake to insure their safety. Chief Justice Holt, in *Coggs* v. *Bernard* (Ld. Ray., 909), said—'The law charges this person (the carrier) thus entrusted to carry goods against all events but acts of God and the enemies of the King. For though the force be ever so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable.' Carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. The common carrier's liability as a contract of insurance has never been implied in respect of goods over which he had not absolute control. Are goods put into a carriage under the control of the Company to this extent? They are put into the carriage because they may be required during the journey or because the passenger wishes to take special care of them and to have them under his eye, or because he desires to take them away with him as soon as the train stops. They are put into the carriage at the request or with the consent of the passenger, in order that he may have some control over them during the transit. While the train is in motion the Company can exercise no control over the goods as distinct from the control they have over the train. There may be in the same carriage with the owner of the goods other persons who, by reason of the passenger's own negligence, may be tempted or enabled to injure the goods or deprive the owner of them. The real question is whether, as regards the particular bag, there was an implied contract of insurance. We think there is no sufficient ground upon which a Court can properly make a presumption that the Company carried it under a liability, or implied contract, to carry it safely at all hazards. The Company undertake to carry the passenger; they equally undertake to carry his luggage, which, with their consent, is placed with him in the carriage. But they are not gratuitous carriers of those goods, as they receive them into

their carriages in consideration of the passenger paying his fare. The Company, therefore, must, according to ordinary principles, be held liable for the loss or injury caused by *their negligence* in respect of the luggage as carriers for hire and contractors to carry. The Company have, in fact, the same liability with respect to the carriage of the luggage as they have with respect to the carriage of the passenger himself. We are of opinion this Court is not bound by the authorities (*Butcher* v. *London and South Western; Richards* v. *London Brighton and South Coast*) to decide that the Company are liable if, in our opinion, the Company cannot on principle be held to have undertaken the liability of common carriers in respect of the Plaintiff's bag—that is, to have contracted to become insurers of it. For the reasons stated we are of opinion that they did not so contract, and that the Judgment in favour of the Company should be affirmed." Lord Justice Bramwell and Lord Justice Brett concurred.—*Tried in Court of Appeal, November* 21 *and* 22, 1877, *and January* 14, 1878.—*From Law Times Reports, vol.* 38, *page* 161.

ARRIVAL.

Luggage Lost off Platforms at End of Journey, when the Question of a Legal Delivery Arises.

	Case No.		Case No.
Richards v. *L. B. & S. C.* (1849)	454	*Kent* v. *Midland* (1874)	456
Butcher v. *L. & S. W.* (1855) ...	455	*Patscheider* v. *G. W.* (1878) ...	457

454. *Richards* v. *London Brighton and South Coast Railway Company.*—Action for £150 for a dressing-case, containing articles of value, carried as passenger's luggage and lost, Woodgate to London. Mrs. Richards, the Plaintiff's wife, was an invalid, and all her luggage was placed in the van except her dressing-case, which was placed in the carriage under her feet. On arrival at London Mrs. Richards was lifted into a hackney coach drawn up beside the platform, and her luggage carried by the Company's servants from the carriage to the hackney coach. On arrival at destination Mrs. Richards missed the

dressing-case, which had never been seen in the hackney coach, and which was not found subsequently. The case was first tried before Chief Justice Wilde, at London Guildhall Sittings, Trinity Term, 1848, when a verdict for £150 was found for Plaintiff. The Company obtained a rule *nisi* for a non-suit or to enter a verdict for Defendants. On the appeal case Chief Justice Wilde said—"The duty of common carriers in the common course is perfectly well understood—they give a warranty safely and securely to convey and deliver. It is immaterial whether there be negligence or not; the warranty is broken by non-delivery. The Plaintiff has made out by evidence that the dressing-case was delivered to the Company's servants. There is nothing more common than for persons to put part of their luggage into the same carriage with them, and that may be done under such circumstances as never to cast any responsibility on the carriers; but that is to be proved. When this is done by the Company's servants, the Company are not relieved from their liability as carriers in respect of it. So a passenger taking a valuable article openly and notoriously into the same carriage in which he travels will not save the Company from responsibility. The case is quite different from that of goods which are about the person of a passenger, which are to be considered entirely under his personal control and custody. In that case there is no delivery to or acceptance by the Company. Acceptance by the Company is the legal result of goods placed in their hands in the ordinary way in which they consent to receive them. I think the Plaintiff proved all that was essential to entitle him to a verdict on the first count."

Justice Cresswell concurred, and said—"It cannot be said that the Company fulfilled what they undertook if they did not deliver the parcel; and if the usual course of delivery was on the other side of the platform, that would be the place at which they ought to deliver."

Justice Williams concurred, and said—"It seems to me that at the time of the loss the dressing-case was in the custody of the Company as carriers. I must admit I think that before the dressing-case was lost the transit described in the declaration had come to an end. I do not mean to give an opinion whether the Company were obliged to do more than deliver the

luggage on the platform; but I think if they oblige passengers by allowing their servants to carry luggage to coaches their liability continues." Judgment against the Company.—*Tried in Court of Common Pleas, May 5 and 7, 1849.—From Law Journal Reports, vol. 18, page 251.*

455. *Butcher* v. *London and South Western Railway Company.*—Action for £400 money in a carpet bag stolen at London Bridge Station. Plaintiff with his wife were passengers, Farnham to London. He took his carpet bag with him into the carriage, and a box, a second package, was put into the van. At London Bridge Station, while standing on the platform looking for his box, a Company's porter asked Plaintiff if he wanted a cab, and took from him the carpet bag, which he put on the footboard of a cab outside the station, and returned for the box. In the meantime the cab drove off, and neither carpet bag nor money could afterwards be recovered. At Kingston the Plaintiff obtained a verdict against the Company for £400, the Judge giving leave to enter a non-suit if the Court should be of *opinion that there was no evidence to go before a Jury.*

On the appeal case Plaintiff pleaded the Company's contract to carry him and his luggage safely, continued until the luggage was delivered to the passenger in his cab, and that the mere temporary possession of the luggage by the passenger on the platform did not alter the liability of the Company to complete the whole of their contract, seeing Plaintiff had not indicated he was satisfied with that as a termination of the contract. The Company contended their contract was completed on delivering the Plaintiff his luggage safely at the platform; that his luggage was then in his own possession, and he himself was looking for a cab; and that the porter who assisted him did so as his agent, and not as a servant of the Company; and that the Company were not responsible for the cabman's felony.

The Chief Justice said the case of *Richards* v. *Brighton Railway Company* (2 Com. B. Reports, page 839) governed this case, which established that the delivery of the passenger and luggage *must be in the ordinary mode on the arrival of a train.* Parties might accept something short of what was

fixed by the contract. Whether or no there was a perfect delivery to the Plaintiff as he stood on the platform with his carpet bag in his hand, was a question of fact for the Jury. The Company had not shown what they did with the bag. An officer of the Company took charge of the bag from the Plaintiff, and nobody knew anything more about it. The learned Judges all thought there was evidence that it was right it should go before the Jury, and that the verdict, therefore, ought to stand. Rule discharged.—*Tried before the Chief Justice and other Judges, May*, 1855.—*Law Journal Reports, vol.* 24, *page* 137, *C.P.*

456. *Kent* v. *Midland Railway Company.*—Action for £84 for loss of a portmanteau and carpet bag, passenger's luggage, Bath to Chester. Plaintiff took a through ticket, and the notice on the ticket was—

"This ticket is issued subject to the regulations and conditions stated in the Company's time-tables and bills."

One condition was—

"The Company does not hold itself responsible for any delay, detention, or other loss or injury whatsoever arising off its line, or from the acts or default of other parties."

The Plaintiff took no notice of this condition on the ticket, and never saw the time-tables or bills. At Birmingham the Plaintiff had to change trains; a London and North Western Company's porter took his luggage from the Midland train to convey it to another platform for the London and North Western Company's Chester train. Plaintiff saw the porter and the luggage on the platform, but when he got to Stafford the luggage was missing, and had not been recovered. The case was first tried at the Liverpool Summer Assizes, 1874, when a verdict was entered for Plaintiff for £84, with leave to the Company to appeal—the Appeal Court to have power to draw inferences of fact. On the appeal case Chief Justice Cockburn said—"I think our Judgment must be against the Company. There is nothing to show that the luggage was actually delivered into the custody of the London and North Western Company, or that it was ever carried on their line and lost on their line. The porter acted, no doubt, in the service of the London and North Western Company, yet the Midland Company were entitled to his services by virtue of an agreement between the two Companies con-

firmed by Parliament. Under these circumstances (doubt of transference from one Company to another), but *for the particular stipulation* which has been insisted on, there could be no doubt that the Midland Company was liable for the loss. Now, in the strict sense of the words of the contract, the luggage at the time it was last seen was 'off the line' of the Midland Company. But we must give the contract a reasonable intendment, and understand by 'off their line' 'out of their custody.' The luggage when last seen was not out of the custody of the Midland Company; they were bound to have it conveyed to the carriages of the London and North Western Company, and for that purpose they were entitled to the services of the porters of the latter Company, who must, for the occasion, be taken to be their own servants. Holding the words 'off their line' as equivalent to 'out of their custody,' and the luggage not being shown ever to have been out of their custody at the time it was last seen, I think the Company fail to establish that the case is within the exception, and therefore they are liable for the loss." Justice Blackburn, Justice Quain, and Justice Archibald concurred. Judgment against Company.—*Tried in Court of Queen's Bench, November* 2, 1874.—*From Law Journal Reports, vol.* 44, *page* 18.

457. *Patscheider* v. *Great Western Railway Company.*—Action for £30 by a lady's-maid for a lost box of passenger's luggage, Malvern to Paddington. There were five boxes belonging to the mistress, and one belonging to the maid. On arrival at Paddington the maid saw the six boxes taken out of the van and placed on the platform; she went for the station hotel porter, and gave directions to him to take the boxes to the hotel, but when the truck containing the other boxes arrived at the hotel her box was missing. The case was first tried before Justice Denman on May 31, 1877, when the Judge left three questions of fact to the Jury, who found (1) that there had been no delivery of the box to the Plaintiff; (2) that the box had been lost through the negligence of the Company's servants; (3) that the Plaintiff had been guilty of no negligence. Damages, £30. A rule was obtained for a new trial on the ground of misdirection, the Jury not being told what

was in law sufficient to constitute delivery. On the appeal case Baron Cleasby said he concurred with *Redfield on Railways*, that "'it is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can call and receive it; and it is the owner's duty to call for and remove it within reasonable time.' I think, until the passenger has the opportunity of taking away his luggage, it remains in the custody of the Company. As to the law, I should have no hesitation in saying their throwing it out upon the platform, mixed, as it might be, with other luggage, was not a delivery or discharge of the Company's obligation. Can there be any other question than whether it was taken away before anything had taken place in the way of delivery except placing it upon the platform? I am of opinion our Judgment should be for Plaintiff." Justice Hawkins concurred, and said—"I am clearly of opinion the Jury, upon the evidence, rightly found the box was not delivered. There clearly was never a delivery of the box to the Plaintiff. Then it is said the Plaintiff was guilty of negligence, having seen the box come out of the van, in not having kept her eye upon it to see no one took it away. I think the Jury were quite right in coming to the conclusion that she was guilty of no negligence. I quite understand, if a reasonable time elapses for a passenger to take his luggage, and he does not take it, he cannot complain and say the Railway Company are to be responsible." Judgment against the Company.—*Tried in Exchequer Division, January* 21, 1878.—*From Law Times Reports, vol.* 38, *page* 149.

ARTICLES CARRIED BY PASSENGERS AS LUGGAGE HELD TO BE MERCHANDISE, AND THE COMPANY HELD NOT LIABLE FOR THEIR LOSS.

		Case No.
Ivory Handles of Knives	*Shepherd* v. *G. N.* (1852) ...	458
Artists' Sketches	*Mytton* v. *Mid.* (1859)... ...	460
Samples of Perfumery	*Cahill* v. *L. & N. W.* (1861)	462
Watches	*Keys* v. *Belfast & B.* (1861)...	459
Groceries	*Atkinson* v. *G. S. & W.* (1861)	461
Travellers' Patterns	*Dunn* v. *C. & H.* (1862) ...	463
Attorneys' Deeds and Papers, Bank Notes	*Phelps* v. *L. & N. W.* (1865)...	464
Rocking-horse	*Hudston* v. *Midland* (1869) ...	465
Sheets, Blankets, and Quilts	*Macrow* v. *G. W.* (1871) ...	466

458. *Shepherd* v. *Great Northern Railway Company.*—Action for £40 3s. 2d. (120 doz. ivory knife handles, £33 19s. 8d.; carpet bag, 7s.; books, 15s.; two handkerchiefs, 1s. 6d.; loss on sale, &c., £5) for loss of articles quoted, carried as passenger's luggage. Plaintiff, a cutler in Sheffield, took a third class excursion ticket for 5s., Sheffield to London and back. He purchased the knife handles in London. He returned next day by the excursion train with a carpet bag, two brown paper parcels, and a deal box. The deal box was placed in the van, and the other packages in the carriage with Plaintiff. After leaving Retford a collision took place, and Plaintiff and his wife were hurt. After the collision Plaintiff was sent on by another train to Sheffield. On leaving the scene of collision he spoke to one of the porters about the luggage, and was told not to make himself uneasy, it would be all right. Plaintiff received the deal box, but the other articles were never restored to him. Each of the packages had upon it Plaintiff's name and address, both at Sheffield and London. The case was tried in the County Court, and a verdict given for Plaintiff, £35 3s. 2d. The Company contended that the weight of the goods was above 56 lbs., and that the goods lost were merchandise and not luggage. The County Court Judge held that Plaintiff's wife travelling with him entitled him to carry 1 cwt. luggage; that the Company might have refused to carry the packages on account of their containing merchandise, but as the Company had not refused to do so they were liable on the common law liability. The Company

contended the goods lost were never in their custody, but that of the Plaintiff. This the Judge also overruled.

The questions coming before the Court of Exchequer on appeal are (1) whether, under the circumstances proved at the trial, the Company are liable for the loss of the above articles of merchandise; (2) whether, under the circumstances proved at the trial, the Plaintiff and his wife were jointly entitled to carry between them 112 lbs. of luggage; (3) whether the Company had accepted the custody of the goods, under the circumstances proved at the trial, so as to render them liable to the Plaintiff, or whether the goods were in the sole personal custody of the Plaintiff.

Baron Parke decided—"There being *no special* contract (to the contrary), the Company were bound to carry the Plaintiff and his *luggage*, which term, according to the true modern doctrine on the subject, comprises clothing and such articles as a traveller usually carries with him for his personal convenience, perhaps even a small present or a book for the journey, but certainly not merchandise or materials bought for the purpose of being manufactured and sold for a profit. If Plaintiff had carried these articles exposed, or packed them in the shape of merchandise, that the Company might know what they were, and they had chosen to treat them as personal luggage and carry them without demanding any extra remuneration, they would have been responsible for the loss. So also upon any limit in point of weight, if the Company choose to allow a passenger to carry more they would be liable. I am of opinion the Company are not liable for the knife handles." Judgment of Court below reversed. The Company undertook to pay the £1 3s. 6d. for the articles of personal luggage.—*Tried, Trinity Term*, 1852.—*From Exchequer Law Reports*, 8 *Exchequer, page* 30.

459. *David Keys* v. *Belfast and Ballymena Railway Company and Londonderry and Coleraine Railway Company.*—Action for £1,890 for a travelling case containing 188 gold and 10 silver watches. Plaintiff was a second class passenger by the two Companies' lines from Belfast to Londonderry on a through ticket, for which he paid 10s. He had the case in the carriage with him up to Coleraine. Between that point and Londonderry

the guard required the case to be removed to the van appropriated for the carriage of luggage (the report does not state why, probably to make room for passengers). The case could not be produced at Londonderry, and Plaintiff pleaded it was stolen by the Companies' servants. The case was tried on 24th June and following days, 1857, before the Lord Chief Justice and a Special Jury, in the Common Pleas Court, Dublin. Verdict for Plaintiff. The Jury assessed the damages at £1,261. The Jury found (1) that the case was, in appearance and in fact, fit and proper for, and manifestly did contain merchandise; (2) that there was no improper concealment by Plaintiff; (3) that the Companies were common carriers; (4) that the Plaintiff was required to deliver and did deliver to the guard the case and watches; (5) that the Companies did contract; (6) that the Companies were not guilty of gross negligence.

The Companies then moved the same Court to reverse the verdict, but failed, and Judgment was finally entered against Companies for £1,510 9s. 9d., including costs.

The Companies then appealed to the Court of Exchequer, and suggested error, and seven Judges heard the case. The Judges being equally divided in opinion, the Judgment of the Court below held good.

The Companies appealed to the House of Lords on the 5th July, 1861, and obtained a verdict in their favour. The Lord Chancellor said—"The case might have been decided in five minutes by the application of the most ordinary amount of judicial knowledge. The Companies announced to the world they would not take merchandise as passengers' luggage, and that was well known to Plaintiff; and a passenger, if he took his merchandise with him, was bound to pay at a certain rate for it. Notwithstanding, Plaintiff took merchandise with him into the carriage, and without communication to the Companies of what he was doing. It was plain he intended to have carried as personal luggage what, in fairness, he was bound to have stated and paid for as merchandise. Plaintiff knew the Company's servants were bound to obey the rule, and he could not at all, in reason or in justice, found himself upon any liability of the Company contracted by an act done by a servant of the Company in direct contravention of the rule

laid down by the Company for the guidance of its servants. There could not exist, in law or reason, any contract between Plaintiff and the Company touching those goods, whereby the Plaintiff would have a right against the Company." Lord Wensleydale said—"Now the original contract certainly was that the Plaintiff was not to pay anything for his luggage, but he was bound to pay for merchandise, and that acceptance of it by the guard would not create an alteration of that original contract with the Company."—*Reported in House of Lords (Clark's) Cases, vol.* 9, *page* 556.

460. *Mytton* v. *Midland Railway Company.*—Action for £97 16s. 6d, contents of a portmanteau, the luggage of an artist travelling between Newport, S.W., and Birmingham. The claim consisted of £26 16s. 6d. for personal articles, £30 for sketches, £16 travelling expenses, and £25, value of remainder of season lost. Claimant took a through ticket, and saw his luggage labelled. At Gloucester he carried his portmanteau from the South Wales platform to the Midland platform, and gave it to the guard of the Midland train. The Company pleaded (1) that the contract was made with the South Wales Company; (2) that the paintings were within the meaning of the Carriers' Act, being above £10 in value, and Plaintiff, not having declared their value, was not entitled to recover; (3) that the sketches were not personal luggage. Before Baron Pollock and a Special Jury, at Westminster, Plaintiff obtained a verdict for £56. On appeal before the full Court, the Judges unanimously decided the sketches were within the meaning of the Carriers' Act, and were not ordinary luggage. Baron Martin held that the contract was made with the South Wales Railway Company, and not with the Defendants. Seeing that the Act incorporating the South Wales Railway had a proviso that a passenger takes his luggage at his own risk, an action would not have succeeded against that Company. The Defendants' Act has no such proviso, hence Plaintiff had taken his chance to try and recover. The principle of *Muschamp* v. *Preston and Lancashire Railway Company* applied in this case.—*Tried at Westminster, June* 14, 1859, *before full Court.—From Clearing House Reports; reported also in Law Journal Reports, vol.* 28, *page* 385, *Ex.*

461. *Atkinson* v. *Great Southern and Western Railway Company.*—Action for refusing to carry, Dublin to Straffan, a hamper of groceries with Plaintiff as passenger's luggage, he offering to pay for excess weight, if any. Company contended groceries were not personal luggage as specified in their time-table. Verdict for Company.—*Tried by Thomas Lefroy, Chairman Quarter Sessions, Kildare.* An appeal was made. The Chief Justice confirmed the verdict, and said it did not depend upon the quantity but the kind of articles offered by passenger for carriage.—*Tried before the Lord Chief Justice at Naas Spring Assizes,* 1861.—*From Irish Clearing House Reports.*

462. *Cahill* v. *London and North Western Railway Company.*—Action for £74 13s. 4d. for a box of perfumery and traveller's patterns, carried per passenger train, Northampton to London, and lost in transit. Plaintiff, a commercial traveller, took a second class ticket, and took with him a box about 3 feet long by 18 inches wide and 12 inches deep, covered with a black leather case. Across the top on each end the word "Glass" was painted in white letters about two inches long. The Company's porter at Northampton took the box on his barrow and put it into the van. The Plaintiff had not more than the usual weight allowed to passengers. The case was first tried at the Middlesex Sittings after Trinity Term, 1858, before Chief Justice Cockburn, when a verdict was found for Plaintiff for above sum and 40s., cost of suit. The Company appealed, when Chief Justice Erle gave Judgment—"I am of opinion the Company are entitled to our Judgment. The article that was lost was a package containing entirely merchandise, and not containing anything in the nature of wearing apparel or property coming within the description of personal luggage. The package having been marked 'Glass,' it is said ought to have created a suspicion on the Company's part, and led to inquiry, and because it did not do so it must be assumed the Company took the merchandise, knowing it to be such and not personal luggage. I am against the Plaintiff on this point. I am of opinion the box was carried at the risk of the Plaintiff because it contained merchandise, which the Company's rules require to be paid for as such. If the passenger prevents the

Company getting their just compensation, he may very well be held to have the article carried at his own risk. My Judgment is founded on the case of *The Great Northern Railway* v. *Shepherd* (9 Law Journal Reports, 286, Exchequer). Plaintiff clearly cannot recover for his loss, there being, as I have said, no such contract. Justices Willes and Byles concurred.—*Tried in Court of Common Pleas, April* 26, 1861.—*Law Journal Reports, vol.* 30, *page* 289.

This case was taken by appeal to the Exchequer, and affirmed by Chief Justice Cockburn.—*Law Journal Reports, vol.* 31, *page* 271.

463. *Dunn* v. *Chester and Holyhead Railway Company.*—Action for £35—for loss of time, expenses, and commission—for detention over ten days of a traveller's case of patterns, Manchester to Dublin. The Plaintiff, a commercial traveller, alleged he saw the case on the wharf at Holyhead, and directed a porter to put it on to the steamer. It was unaddressed, and found in lost luggage office, Chester. Company pleaded that by common law, before railways, a common carrier was only bound, in absence of a special agreement, to carry passengers' personal luggage and not merchandise, which must be paid for. By Company's special Act, 7 & 8 Vic., cap. 65, secs. 356 and 357, the quantity of personal luggage was limited. The case contained samples of carpeting and other goods. Dismissed with costs.—*Tried before the Recorder of the City of Dublin, April* 24, 1862.—*From Irish Clearing House Reports.*

464. *Phelps* v. *London and North Western Railway Company.*—Action for delay to a portmanteau carried as passenger's luggage. The portmanteau belonged to an attorney who was going to attend two County Court cases, and it contained certain professional deeds and documents and some money in bank notes. The temporary loss of the portmanteau compelled the postponement of the trials and rendered Plaintiff's journey fruitless, whereby inconvenience and expense were entailed. On the first trial the Judge left to the Jury—(1) What damages did Plaintiff sustain on the assumption that he was entitled to carry the deeds, documents, and bank notes as part of his ordinary luggage? (2) What damage did he

sustain on the assumption that he was only entitled so to carry his clothing and analogous articles? On the first assumption the Jury returned a verdict for £44 1s., and the second £20. This was a verdict for £44 1s. Leave was given to appeal to reduce the verdict to £20. On the appeal case Chief Justice Erle said—"I am of opinion that our Judgment should be for the Company, to reduce the verdict to £20. I consider the loss in respect of the deeds, notes, &c., is not a loss connected with luggage for his personal use in his journey as a traveller. It is impossible to draw a definite line. These articles are entirely out of the category of passengers' personal luggage; they were not for Plaintiff's personal use, but were taken by him in his capacity of attorney for the service of another person, and I think the Company are not to be held responsible for them." Justice Willes concurred. Justice Byles concurred, and said—"I should doubt if a man's own title deeds and securities can be called 'ordinary luggage.'" Judgment for Company, to reduce verdict to £20.—*Tried in Court of Common Pleas, May* 26, 1865.—*From Law Journal Reports, vol.* 34, *page* 259.

465. *Hudston* v. *Midland Railway Company.*—Action in respect to a child's rocking-horse, weighing 78 lbs. and 44 inches in length, carried as passenger's luggage, Derby to Nottingham. This case was tried in the Derby County Court, and a verdict given for the Company, on the ground that a rocking-horse was not ordinary passenger's luggage. An appeal was taken to the Court of Common Pleas, when Mr. Justice Lush confirmed the verdict for the Company given at the County Court. He said it was not difficult to define what was excluded by the Company's rule. "The privilege does not extend to the carriage of articles of merchandise—that is, articles carried for the purpose of sale—nor to articles carried for hire or profit—that is to say, when the person makes a profit from the carriage of it, although the articles may be of a description falling within the meaning of the term 'personal,' or, to take the language of the statute, 'ordinary luggage.' It is extremely difficult to frame a definition in terms which shall embrace all that is intended to be brought within it and to exclude all that is intended to be

excluded. The particular article in question, I think, goes beyond the limit of personal luggage. It is an article which is called a child's toy, but you cannot properly call a thing of that description, weighing 78 lbs., a child's toy. It does not, to my mind, come under the description of a mere toy, for the word 'toy' gives one the idea of something which can be carried in the hand. I think we must confine the description of personal luggage in the sense that I have mentioned, namely, *that description of goods which passengers usually carry as part of their luggage.*" The other Judges agreed, and the Court gave a verdict for the Company.—*Tried in the Court of Queen's Bench, before Justices Lush, Hannen, and Hayes, May* 20, 1869.—*Law Journal Reports, vol.* 38, *page* 213.

466. *Macrow* v. *Great Western Railway.*—Action for loss of a trunk, passenger's luggage, Liverpool to London. The Plaintiff had returned from Canada, and amongst other articles in the trunk were six pairs sheets, six pairs blankets, and six quilts. The Company contended they were not liable for such household goods when carried as passengers' luggage. The case was first tried before Justice Blackburn, Middlesex Sittings after Michaelmas, 1870, when the Jury found for Plaintiff £22 8s. 6d. beyond the £39 4s. paid into Court, and that the sheets, blankets, and quilts were personal luggage, and were worth £16. The Company appealed to reduce the verdict by the £16. On the appeal case Chief Justice Cockburn said—"The articles as to which the present question arises consisted of bedding. Now, though we are far from saying that a pair of sheets, or the like, taken by a passenger for his own use on a journey might not fairly be considered as personal luggage, it appears to us that a quantity of articles of this description intended, not for the use of the traveller on the journey, but for the use of his household when permanently settled, cannot be held to be so." Verdict for Company, to reduce the previous verdict by the £16.—*Tried in Court of Queen's Bench, June* 7, 1871.—*From Law Reports, Q.B., vol.* 6, *page* 613; *also reported in Law Journal Reports, vol.* 40, *page* 300, *Q.B.*

Luggage Carried by a Passenger Travelling on an Excursion Ticket, and Lost.

	Case No.		Case No.
Rumsey v. *North Eastern* (1863)	467	*Stewart* v. *L. & N. W.* (1864) ...	468

467. *Rumsey* v. *North Eastern Railway Company.*—Action for detention of Plaintiff's portmanteau. Plaintiff, a commercial traveller, took a cheap return day ticket, Scarborough to Whitby, for 5s., the ordinary first class fare being 9s. Passengers taking the cheap tickets were not allowed to carry luggage. Plaintiff got his portmanteau into the van surreptitiously, and at Malton wished it to be sent on to York, where, probably, he was going after leaving Whitby. The portmanteau was carried to Whitby and 3s. 1d. carriage demanded, and in default of payment it was detained. Baron Martin told the Jury that the Company's Act made no distinction as to excursion passengers, but gave every first class passenger the right to carry 150 lbs. of luggage, and unless the Plaintiff had made a contract to pay carriage the Company had no right to detain the portmanteau. The Jury, on this direction, gave a verdict for Plaintiff. From this decision there was an appeal, when the verdict was set on one side. Lord Chief Justice Erle, in giving Judgment, said—"I think the Company's Act allowing 150 lbs. luggage *meant every passenger that chose to claim that right.* A man may renounce a privilege given by statute and may make a bargain with a company. If he renounced that right and induced the company to deduct a sum for renouncing that right to take luggage, he would by no means be justified under the Act if he got deceptively and by fraud his luggage into the train. *Chitty on Contracts* lays it down—'If a man, intending to get a service performed and by deception to evade payment—if he get the service performed, the law implies a promise to pay for it.'" Mr. Justice Williams said he was "unable to discover anything in the Company's Act, or anything on principle as being contrary to public policy, which prevents a bargain between a passenger and a railway company. A passenger

may say, 'I will give up my right under the Act to take my personal luggage free in consideration that you reduce the fares to a lower amount,' and there was evidence for a Jury that in this case such a bargain was made. There appears evidence to go to a Jury that Plaintiff acted the part of an excursion train passenger when he took his ticket, and acted the part of a non-excursion train passenger when he delivered his luggage, and that he committed a fraud in so doing. I think the principle applicable that the fraud of the Plaintiff stood in the place of a request to carry for hire." Justices Willes and Byles agreed on the rule.—*Tried, on appeal, in Court of Common Pleas (date not given), about* 1863. (*Law Times*, vol. 8, page 666, quotes "Rimsey," not "Rumsey.")

468. *Stewart* v. *London and North Western Railway Company.*—Action for £39 14s., value of a portmanteau lost between London and Liverpool. Plaintiff, in September, 1862, took a first class Marcus excursion ticket, Liverpool to London and back, for 17s. 6d. On the first half of the ticket was printed "Ticket as per bill," and on the back of each half "Forfeited if transferred. This ticket is issued subject to the conditions contained in the Company's time and excursion bills, and if used for any other train or station the ticket will be forfeited and the full fare charged." The Company's small excursion hand-bills stated "Luggage under 60 lbs. free, at passengers' own risk." Plaintiff admitted seeing the Company's large posters, and that they gave reference to the small bills for particulars, but he denied having seen the small hand-bills with the said notice. The case was first tried at the Liverpool Borough Passage Court, April 5, 1864. The Jury found Plaintiff had not seen the small hand-bills, and the Judge directed a verdict for Company, with leave to appeal. Plaintiff appealed, when Chief Baron Pollock said he was of opinion that this case was not within the Traffic Act, and the Judgment must be for the Company. "There is a rule in the English law that every man must be taken to know that which he has the means of knowing, whether he has availed himself of those means or not. The Plaintiff must be supposed to have read the ticket. If he did not choose to consult the hand-bill, that

is his fault, not the fault of the Company. One of the conditions of these special trains is 'Luggage under 60 lbs. is free, but at the passenger's own risk.' If it be sent as goods to be carried in the ordinary way, under the custom of England for carriers to be liable, that is a different matter. The Plaintiff's ignorance, then, was of his own creation, and the luggage was lost in a place where he has agreed to take the risk himself. Under these circumstances the Company are not liable. I think this is not a case of carrier's liability under the common law. *Richards* v. *London Brighton and South Coast* is certainly an authority (which I was not aware of) that the luggage of a passenger is in the same condition as goods sent by a carrier; but I am not convinced by it or disposed to defer to it, and, notwithstanding the authority of Mr. Justice Story to the same effect, I am still of opinion that a carrier undertakes no responsibility in respect of the goods of a passenger beyond that which he undertakes with respect to the passenger himself." Barons Bramwell and Pigott concurred. Judgment for Company.—*Tried in the Court of Exchequer, April* 19, 1864. —*Law Journal Reports, vol.* 33, *page* 199.

In the case of *Lewis* v. *Great Western Railway Company* (L.T.R., vol. 37, 775), when the case of Stewart was quoted, Lord Justice Bramwell said—"That case has been solemnly condemned in this Court, and executed by my brother Brett."

Luggage Lost on the Journey between England and France, or other Foreign Countries.

	Case No.		Case No.
Benett v. *P. & O.* (1848)	469	*Zunc* v. *S. E.* (1869)	472
Pianciani v. *L. & S. W.* (1856)	470	*Cohen* v. *S. E.* (1877)...	473
Shand v. *P. & O.* (1865)	471		

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469. *Benett* v. *Peninsular and Oriental Steamboat Company.*—Action by an intended passenger, Southampton to Gibraltar, that the Peninsular and Oriental Steam Packet Company refused to allow him to take a passage owing to some communication made to them by the Portuguese Consul. The

Plaintiff then sued the Company for a breach of their liability as common carriers.

On the first trial the Lord Chief Justice left it to the Jury to say whether or not the evidence satisfied them that the Defendants carried on the business of common carriers for hire. Verdict for Plaintiff.

On the appeal case Chief Justice Wilde said—"The question is, Can a man be a 'common carrier' of passengers from a place that is within the realm to a place out of it? Mr. Justice Story defines a common carrier to be a person who does just what the Defendants in this case are proved to have done. He says, section 495—'A common carrier has been defined to be one who undertakes for hire or reward to transport the goods of such who choose to employ him from place to place.' It is said that the evidence here did not support the third issue, because the term 'common carrier' imports one who carries from and to places within the realm only. But if we so construe it we make the declaration bad and inconsistent, whereas if we read it as meaning 'common carriers' according to the definition given by Dr. Story, viz., as persons holding themselves out as undertaking for hire or reward to transport the goods of such as choose to employ them from place to place, we shall be giving the allegation a sense that will make it consistent with the breach. I see no reason for holding that 'common carriers' must of necessity mean persons employed to carry within the realm and according to the custom. I think the question was properly left to the Jury, and that the verdict is right." Judgment against the carrier.—*Tried in Court of Common Pleas, December* 6, 1848.—*From Manning and Grainger's Reports, vol.* 6, *page* 775.

470. *Pianciani* v. *London and South Western Railway Company.*—Action in respect of two portmanteaus, passenger's luggage, London to Jersey—delay to one portmanteau, £100; and loss of the second, which contained writings, silks, furs, and lace, £2,500. At the time of delivery the contents and value were not declared.

Plaintiff contended that the real question is whether the Carriers' Act protects the carrier when he makes a contract to

carry both by land and by water. It is submitted that the statute applies only to cases where the termini from and to which the carrier professes to carry are both inland. The statute addresses itself entirely and exclusively to carriers by land, and the carrier has no right to split the contract and say that he makes a different contract for that portion of the journey which is by water from that which is to be performed on land. (Chief Justice Jervis—"The question was raised, but not decided, in this Court in *Benett* v. *Peninsular and O. S.B.C.*, M. & G. Rep., vol. 6, page 775.") All the provisions of the Act are referable to contract for land carriage throughout the realm. (Justice Cresswell—"Would not a mail contractor or carrier between London and Dublin be within the protection of the Act?") Suppose a package is delivered to the Company at Jersey, where they have no receiving-house. (Justice Cresswell—"Why should we assume that the Company have no receiving-house in Jersey?") Under the Carriers' Act the Company were held not liable. Judgment for Company.—*Tried in Court of Common Pleas, May* 6, 1856.—*From Manning, Grainger, and Scott's Common Bench Reports, vol.* 18, *page* 226.

471. *Shand* v. *Peninsular and Oriental Steam Ship Company.*—Action for the loss of a package of greatcoats, plaids, cloaks and shawls, and similar articles, well and firmly put up and bound together in one package, and legibly and properly addressed with name and destination—Southampton to Mauritius. The Plaintiff was, with his family, going to the Mauritius to take up the office of Chief Judge of the island. At Alexandria the Company's officer in charge of the baggage took possession of the package, with other baggage, and said it should meet Plaintiff at Suez. The lady's-maid saw the package at Suez on board the steam tender, but when Plaintiff embarked on the s.s. "Norna" the package was not to be found among the other baggage, and it was never found afterwards. Plaintiff paid £315 for conveyance of himself, his wife, two children under ten, and a lady's-maid. He signed a printed ticket containing the words, "I hereby accept this ticket,

subject to the conditions and regulations indorsed hereon." Among the regulations were—

"First class passengers are allowed 336 lbs. of personal luggage free of freight, and children (over three and under ten) and servants 168 lbs. each. The insurance of baggage can be effected on very moderate terms. The Company do not hold themselves liable for damage to, or loss, or detention of passengers' luggage."

The Plaintiff, in the Court of Mauritius, obtained a Judgment for the value of the package, whereupon the Company brought the present appeal to Her Majesty's Council. The Company contended that, having restricted their liability by means of the printed conditions, they were not liable. The Plaintiff contended that the law of the *place of performance* and not of the *place of making the contract* must govern the question of liability. Lord Justice Turner gave Judgment, and said—"The general rule is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. This is a contract made between British subjects in England substantially for safe carriage from Southampton to Mauritius. The Court below held that the law by which the case was to be tried was the French law, which prevails generally at Mauritius, and that by that law the Company were liable. Their Lordships have, on the whole case, arrived at the conclusion that the Company are not liable, and that the Judgment below cannot be supported. The Company have framed and issued a contract into which they have introduced for their own protection a stipulation professing in its terms to limit the liability which, according to the English law, the contract would otherwise have cast upon them. When they tendered this contract to the Plaintiff and required his signature to it, what must it be presumed that he understood to be their intention as to this stipulation? What would any reasonable man have understood that they intended? Was it to secure to themselves some real protection against responsibility for accidental losses of luggage, and for damage to it, or to stipulate for something to which, however clearly expressed, the law would allow no validity? The case depends on the common law; it is not within either the Carriers' Act of 11 Geo. IV. and 1 Will. IV., cap. 68, or the

Railway and Canal Act, 17 & 18 Vic., cap. 31. It seems now incontestible that at common law it is open to carriers (railway companies, query?) to limit their common law liability by special agreement with the senders of goods, and this, according to some decisions, even to the extent of relieving themselves from the consequences of their own negligence. The contract here is that the Company shall not be responsible 'for damage, or loss, or detention of passengers' luggage;' and the question is, What is the meaning to be given to the word 'loss'? Nothing can be more general than the words used by the parties. They do not enter into any distinctions as to how the damage, loss, or detention may have been occasioned—whether by pure accident, or through the negligence or even misconduct of the Company. But the facts of this case make it *un*necessary to consider whether, reasonably understood, they express an intention to protect the Company against answering for gross negligence or positive misconduct. Their Lordships consider the circumstance that the Company's officer insisted on having the keeping of the package, and refused it to Plaintiff's servant, raises no inference against the Company. Their Lordships have no doubt, on the whole, that the loss in this case falls within the true meaning of the stipulation, and that the Company are thereby protected from being answerable for it. They will therefore humbly recommend to Her Majesty that the Judgment below be reversed, with the costs in the Court below and of this appeal. Judgment for Company.—*Tried before the Judicial Committee of the Privy Council, July* 20, 1865.—*From Law Times Reports, vol.* 12, *page* 809.

472. *Zunc* v. *South Eastern Railway Company.*—Action for £93 14s. 6d. for a portmanteau belonging to Plaintiff, a through-booked first class passenger, London to Paris. It appeared the portmanteau was lost on the Great North of France Railway, between Calais and Paris. The ticket was in three coupons—(1) London to Dover, (2) Dover to Calais, (3) Calais to Paris. On the ticket was printed—

"The South Eastern Company is not responsible for loss or detention of, or injury to, luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the South Eastern Company's trains or boats, and

in this latter case only when the passenger complies with the bye-laws and regulations of the Company, and in no case for luggage of greater value than £6," &c

The portmanteau being over the allowed weight, 3s. excess was paid. The case was tried before Chief Justice Cockburn, London After Sittings, Hilary Term, 1868. The Jury found a verdict for Plaintiff for £93 14s. 6d., leave of appeal being given. On the appeal, Chief Justice Cockburn gave Judgment, and said—"I am strongly disposed to think there was a contract for the through journey. However harsh it may appear in practice to hold a man liable by the terms and conditions—which may be inserted in some small print—upon the ticket, which he only gets at the last moment, after he has paid his money, and when, nine times out of ten, he is hustled out of the place at which he stands to get his ticket by the next comer, still we are bound, on the authorities, to hold that when a man takes a ticket with conditions on it he must be presumed to know the contents of it, and must be bound by them. Nothing can be plainer than that the Company have placed upon the contract a clear restriction that they will not be responsible for loss or for injury to passengers' luggage except while the passenger is travelling by their own train or boat. Unless there is something in law to prevent the Company annexing that condition to the contract, Plaintiff is out of Court. By the *general* law there is nothing to prevent a railway company puting such a limitation on a contract. It is contended the Railway and Canal Traffic Act, 1854, prohibits them from so doing. I am clearly of opinion it does not. Section 2 enacts —'Every railway company shall, according to *their respective powers*,' &c. The general provision is that 'whenever the company is working its own line, or any line which it has obtained power to work,' &c. Duties are imposed upon railway companies by the Act, but those duties are limited to their own lines. If they contract to carry beyond their own lines the whole matter is open and at large. It may be in the case of contracts, London to the north of Scotland, where several lines are passed over, that the company may impose restrictions on their liability beyond their own line." Justices Mellor, Lush, and Hayes concurred. Judgment for Company.—*Tried in the Court of Queen's Bench, Trinity Term*, 1869.—*Law Reports, Queen's Bench, vol.* 4, *page* 439.

473. *Cohen* v. *South Eastern Railway Company.*—Action for £73 1s. for a trunk of passenger's luggage, contents being damaged, from the trunk through carelessness (negligence) having been allowed to fall into the harbour at Folkestone during unloading from steamer to railway. In April, 1875, Plaintiff's wife took a coupon ticket at Boulogne for London. On the ticket was the following notice:—

"The South Eastern Company is not responsible for loss or detention of, or injury to, luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the South Eastern Railway Company's trains or boats, and in this latter case only when the passenger complies with the bye-laws and regulations of the Company, and in no case for luggage of greater value than £6."

The case was brought before Baron Pollock, March 14, 1876, who seemed to be in doubt whether, as the contract was made in France, the case should be tried by French or English law. He made an order for the case to be drawn up and submitted to a Monsieur Roncier, a French avocat, and for it, with this opinion, to be submitted to the Exchequer Division of the High Court of Justice. M. Roncier gave the following opinion:—

"1. According to the French law, and under the circumstances mentioned, the Company is responsible for the injuries which have happened by their neglect and default to the Plaintiff's box. The condition of non-liability printed on the ticket delivered cannot in any way relieve the Company of the responsibility resting on them. The French law does not any more recognise such a preliminary stipulation of non-liability than it does an arbitrary limitation of the sum to be paid in case of loss or of injury to the goods or articles entrusted to the Company.

"2. According to the French law, all contracts being subservient to the law of the place where they have been consented to, and the present contract having taken place at Boulogne, the case, if submitted to a French Tribunal, would be judged, irrespective of foreign law, according to the legislation of France, and the responsibility of the Company would be fully recognised."

In the Court of Appeal Lord Justice Mellish gave Judgment, and said—"I am of opinion that the Judgment for Plaintiff

ought to be affirmed. There was a condition on the ticket limiting the Company's liability by declaring that they would not be liable for luggage above a certain value. It was a clear case of loss by carelessness. The first point is what law ought to govern the decision of this case. It has been proved by a French advocate that, according to French law, carriers cannot protect themselves by conditions from the consequences of their own negligence; and therefore, if the law of France governs the case, the Plaintiff is entitled to succeed. The contract being for carriage to England, I should think that the law of England should govern the case. Parliament has passed Acts relating to through traffic, and inserted clauses for the protection of passengers, and I should think the companies could not escape from the provisions of those clauses by making their contracts with passengers in foreign countries. Does section 7 of Railway and Canal Act apply to passengers' luggage?—viz.: Railway companies 'shall be liable for the loss of, or for any injury done to . . . any articles, goods, or things in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such Company contrary thereto, or in anywise limiting such liability.' Such notices, &c., are declared null and void. It seems to me passengers' luggage distinctly comes within the words of this section. The Regulation of Railways Act, 1868 (31 & 32 Vic., cap. 119), section 10, incorporates section 7 of the Railway and Canal Act so as to apply its provisions to carriage by steamer. By the last clause of section 16 of Act of 1868, it says—'The provisions of the Railway and Canal Act, 1854, so far as the same are applicable, shall extend to steam vessels and to the traffic carried thereby.' It has been said, because these words do not form a distinct section, they do not apply to this case; but there is no such rule of construction. It was foreseen that injustice might be done to the companies if all the conditions applying to common carriers by land were imposed on them in relation to carriage by sea, and therefore it is expressly provided in section 14 that by putting up a notice in the booking-office and printing the condition on the freight note the Company can protect themselves with

regard to the carriage by sea by conditions like those contained in a bill of lading. Then why should they not be subject to the same rules as to restricting their liability as those imposed by the Legislature in relation to carriage by land?" Justices Baggallay and Brett concurred. Verdict against Company.—*Tried at the Court of Appeal, Westminster, January* 22 *and February* 9, 1877.—*From Law Times Reports, vol.* 36, *page* 130.

(Had the notice on the ticket contained a proviso that luggage of over £6 in value should be declared as over £6 in value, and an increased charge paid, the verdict might have been different, in spite of the legal negligence.)

LUGGAGE LOST AT JUNCTIONS AND JOINT STATIONS DURING TRANSFERENCE FROM ONE COMPANY TO ANOTHER COMPANY.

	Case No.		Case No.
Midland v. *Bromley* (1856) ...	474	*Hooper* v. *L. & N. W.* (1880) ...	475
Kent v. *Midland* (1874)	456		

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474. *Midland Railway Company* v. *Bromley.*—Action for £27 16s. for a portmanteau, passenger's luggage, lost. Plaintiff was a passenger, Gloucester to Bristol, and from Bristol he was going forward to Torquay by Bristol and Exeter Railway. The stations at Bristol of the Midland Railway and Bristol and Exeter Railway adjoin, and the luggage is wheeled on trucks from one station to the other. Plaintiff saw his portmanteau put on the truck, and saw the truck pass into the Bristol and Exeter Station, but he never saw his portmanteau afterwards. The case was first tried in the County Court, when the Judge decided that there had been no delivery of the portmanteau, either to the Plaintiff or the Bristol and Exeter Company, and gave a verdict for Plaintiff for amount claimed.

The Company appealed, and on the appeal case Justice Crowder said—"The onus lay on the Plaintiff of giving some evidence of non-delivery of the portmanteau at the Bristol and Exeter Station. I do not find any such evidence. Had

the Plaintiff observed that the portmanteau was not on the truck (at Bristol and Exeter Station), it might have been left to the Jury that it was not on the truck; but the only evidence is that the Plaintiff did not see it on the truck. The evidence, therefore, is equally consistent with the supposition in favour of the Defendants' case as the Plaintiff's." Justice Cresswell said—"I think that this case falls within the principle laid down by Justice Coleridge in the case of *Gilbart* v. *Dale*. The Plaintiff gives no evidence from which a Jury could determine on which of the two railways the portmanteau was lost or stolen. I therefore think the decision below wrong." Judgment for Company.—*Tried in the Court of Common Pleas, January* 23, 1856.—*From Law Journal Reports, vol.* 25, *page* 94.

475. *Hooper* v. *London and North Western Railway Company.*—Action for £15 15s., value of a portmanteau, passenger's luggage, lost in transit, Stourbridge (Great Western) to Euston (London and North Western). A person travelling with Plaintiff proved that after leaving the Great Western train at Birmingham he saw the portmanteau put into the luggage van of the London and North Western train at Birmingham. The portmanteau could not be found at Euston, and did not turn up until three months after, and then very much damaged and contents destroyed. The London and North Western Company, who were sued, contended they were not the contracting company. The case was first tried in the County Court, and a verdict given for the Company as not being the contracting company. Plaintiff appealed to the Court of Common Pleas, when Justice Denman said—"I think we must take it that the case of *Foulkes* v. *Metropolitan District Railway Company* has overruled the case of *Mytton* v. *Midland Railway Company*, but it would have been certainly more satisfactory if *Mytton's Case* had been cited at the trial of *Foulkes' Case* and expressly overruled. The Company did undertake a duty they neglected; that is, they did not take reasonable care of the portmanteau. The County Court Judge decided on the ground that there was no contract between Plaintiff and the Company, but we need not go into

the question of contract. The action was founded on negligence, and the point of law on which the Judge acted is not to prevail." Justice Lindley concurred. Judgment against Company. (See *Foulkes' Case.*)—*Tried in Court of Common Pleas, December* 2, 1880.—*From Law Times Reports, vol.* 43, *page* 570.

IN RESPECT TO THE RIGHT OF SUING FOR LOST LUGGAGE BELONGING TO A SERVANT WHEN HIS MASTER TRAVELLED WITH HIM AND PAID HIS (SERVANT'S) FARE.

	Case No.		Case No.
Marshall v. *Y. N. & B.* (1851)	476	*Becher* v. *G. E.* (1870)	477

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476. *Marshall* v. *York Newcastle and Berwick Railway Co.*—Action for £30 for a lost portmanteau belonging to Plaintiff, a servant of Lord Adolphus Vane, travelling with his master, Darlington to London. It was admitted the master paid for the servant's ticket, and the point raised was that Plaintiff, not having paid his own fare, had no legal ground to recover. The declaration ran—"For reward to the Defendants in that behalf." The case was first tried at the Middlesex Sittings after Trinity Term, 1851, when Lord Chief Justice Jervis directed a non-suit, giving leave to appeal. The case was taken to appeal at the Common Pleas, when the same Judge delivered Judgment—"I am of opinion the Court should set aside the non-suit, and enter a verdict for Plaintiff for £30. It was admitted if Plaintiff, instead of losing his property, had broken his leg, he could have had an action for his personal suffering, and his master might have sued for the loss of his service. But in what respect could he have an action for his personal suffering? Not because there was a contract between him and the Company, but by reason of a duty irrespective of the contract. In that view, if the Plaintiff could recover for his personal suffering, the same admission would apply to the loss of his property. The duty to carry the luggage was the same as the duty to carry the person of the Plaintiff. The Company received the Plaintiff's portmanteau to be carried safely, although they did not warrant. The Act of Parliament would not justify them in

throwing it overboard. There may still be a duty imposed upon them to carry safely notwithstanding they are not insurers. The money for the ticket was paid for him and on his behalf." Justice Williams concurred. Verdict for Plaintiff. —*Tried at Court of Common Pleas, November* 15, 1851.—*Law Journal Reports, vol.* 21, *page* 34, *C.P.*

477. *Becher* v. *Great Eastern Railway Company.*—Action for value of a portmanteau and contents lost during transit per passenger train. Plaintiff, with several other gentlemen, had gone to Newmarket for the races, and had taken a man-servant to attend upon them in common. Plaintiff had given the servant a sovereign for his attention. The servant, proceeding by an earlier train from Newmarket for London, had taken with him the portmanteau. The Company denied liability to Plaintiff, as they made no contract with him for the carriage of the portmanteau. Justice Mellor said—"We are satisfied this action cannot be maintained. There can be no doubt the portmanteau was received by the Company as the luggage of the servant, and that he was regarded by them as an ordinary passenger. It is unnecessary to say that the case where a man says 'This is not my luggage, but my master's,' may give rise to different considerations. But here there was nothing of the kind. The person with whom they legally contracted was the servant, and the only duty imposed upon them is that which is founded on their contract with him." Justice Lush concurred. Judgment for Company.—*Tried in Court of Queen's Bench, February* 11, 1870.—*From Law Journal Reports, vol.* 39, *page* 122.

ARTICLES FOUND IN A RAILWAY CARRIAGE BELONG TO THE FINDER IN THE ABSENCE OF THE RIGHTFUL OWNER CLAIMING THEM.

Case No.
Great Western v. *Emanuel* (1866) 478

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478. *The Great Western and Metropolitan Railway Companies* v. *Emanuel.*—Action for £50 damages for detention of a purse found in a railway carriage, and containing one penny. Mr. Joel Emanuel, a law student, travelling on the

Plaintiffs' line, found a purse which had been dropped by some unknown passenger on the floor of a second class carriage. He gave notice of the finding at the station, and his name and address, where the owner might have it on application, but he refused to give up the purse, claiming a right to detain it as being the finder. The Company sought to recover it.

The Judge said the important question was whether a purse conveyed about the person of a traveller was such luggage accompanying him on his journey as would render the Company bailees by a constructive delivery, and, if so, give them the right to recover it out of the possession of a third party having found it in one of their carriages. He was of opinion there was a wide distinction between articles kept by the traveller exclusively about his own person and never intended to be deposited in the Company's carriages or entrusted in any way to their care, as, for example, a gold watch or a purse containing money. The Railway Company could in nowise be considered as bailees by a constructive delivery of the purse. If that were so, the question would be who had a right to its possession. Clearly, by all the authorities, the finder had the right of property in the thing found against everyone but the lawful owner. Mr. Emanuel had a right to the purse although found upon the floor of a carriage belonging to the Railway Company, for it was never under their protection before it was lost. "I may add that, if it is thought desirable, I should suggest that an Act might easily be introduced making the provisions of the Hackney Carriage Act, as regards the finding of valuable property in the carriages or upon the premises of railway companies, applicable throughout the kingdom." Judgment against the Company.—*Tried in Marylebone County Court, before Sir J. Eardley-Wilmot, February* 6, 1866.—*Law Times, vol.* 41, *page* 227.

ARTICLES OF LUGGAGE LOST OR STOLEN OUT OF CARRIAGES.

	Case No.		Case No.
Le Conteur v. *L. & S. W.* (1865)	479	*Leach* v. *S. E.* (1876)...	451
Talley v. *G. W.* (1870)	480	*Bergheim* v. *G. E.* (1878)	453

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479. *Le Conteur* v. *London and South Western Railway Company.*—Action for £25 for a nautical chronometer belonging

to Plaintiff, a master mariner, and stolen from the Company's carriage at Southampton Station. Plaintiff was travelling on a return ticket, London to Jersey and back. On the return journey, at the Southampton Station, he went to a carriage with one of the porters, who put the chronometer inside on the seat, and then both of them left the carriage to look after the rest of Plaintiff's luggage. They were absent fifteen minutes, and on their return the chronometer was gone, and never since had been heard of. Plaintiff contended that the chronometer was in the custody of the Company though placed in the carriage in which the Plaintiff was about to travel, and that the Carriers' Act, 11 Geo. IV. and 1 Will. IV., cap. 68, sec. 1, relating to the declaration of clocks or timepieces over £10 value, did not apply to a contract which was not for carriage by land alone, but carriage by sea and land. The Company contended that the article being over £10 in value, and not having been declared, they were protected by the Carriers' Act. Chief Justice Cockburn said—"There may be circumstances in which a passenger who has luggage, which by the terms of their contract the Company are bound to convey to the place of his destination, may release the Company from their obligation as carriers for its safe custody by thus taking it into his own personal custody and charge. But the circumstances must be such as clearly to bring the case within that principle. It is not because the article is by the common consent of the passenger and Company placed in a carriage along with the passenger that therefore the Company are to be relieved from their obligation as carriers for safe custody. I am satisfied the chronometer was not withdrawn from the Company's custody, for all that took place was that, by the desire of the Plaintiff, the porter placed it in the railway carriage. The defence was rested on the Carriers' Act, and it was not seriously disputed that this was an article which came within the Act as a 'timepiece.' But it was urged that the contract was one which came within the Act, because it was a contract for conveyance by sea as well as by land, and that it was an entire contract, and so not divisible. That argument, however, fails, both on principle and authority. The question has been decided in favour of the Company by the Court of Common Pleas in the case of

Pianciani v. *L. & S. W. Railway* (18 C.B., 226), in which case the Court expressed a strong opinion that the contract in such a case as this was divisible, and that, as far as regarded the conveyance in this country, it would afford the Company a protection. I entirely concur in the view there taken. Both upon principle and upon authority, therefore, I think that the Company is entitled to the protection of the Carriers' Act, and therefore that upon this ground our Judgment should be for the Company." Justices Mellor and Shee concurred. Justice Lush also concurred, and said—"The porter was there for the purpose of assisting the passengers and to receive the luggage which the Company had contracted to carry. They might have said that it was not such an article of luggage, or that they could not take charge of it in that way. But it is well known that it is every day's practice for passengers to carry packages with them in the carriages, and it cannot be said that in such a case the article is not under the care of the Company." Judgment for Company.—*Tried in the Court of Queen's Bench, November* 14, 1865.—*From Law Times Reports, vol.* 13, *page* 325.

480. *Talley* v. *Great Western Railway Company.*—Action for articles missing from a portmanteau, Swindon to London. Plaintiff was travelling from Cheltenham to London, and had the portmanteau in the carriage with him. He left the train at Swindon for refreshments, and got into another carriage, in which he completed the journey. Some persons unknown robbed the portmanteau between Swindon and London. The Jury negatived any negligence on part of Company's servants, and found that Plaintiff by his negligence contributed to his loss. The Judge, notwithstanding, ordered the verdict to be entered for the Plaintiff, with leave for the Company to appeal. It was not clearly made out what caused Plaintiff to get into a different carriage at Swindon.—*Tried before Sir John Eardley Eardley-Wilmot and a Jury, Marylebone County Court of Middlesex, October* 5, 1869.—*Appeal heard, Court of Common Pleas, before three Judges, June* 23, 1870.—*Judgment given November* 11, 1870. The Court held that the Company's liability as common carriers had been limited by Plaintiff taking the luggage into the carriage in

his own charge, and hence subjecting himself to the condition that he should take reasonable care and not by his negligence contribute to the loss. The Court held he had done otherwise, and hence the Company were not liable, and they reversed the decision of the Court below.—*Reported in Law Journal Reports, vol.* 40, *page* 9, *Common Pleas.*

ARREST OF PERSONS, ASSAULTS, ETC.

SUPERINTENDING OFFICER OR AGENT OF THE COMPANY CAN BIND THE COMPANY, HAVING A GENERAL AGENCY TO ACT FOR THE COMPANY.

	Case No.
Giles v. *Taff Vale* (1853)	211

DIGEST.

In *Giles* v. *Taff Vale* (1853), on the question of authority to bind the Company, the Court held unanimously that it is the duty of a Company carrying on trade to have on the spot an officer with authority to do for the Company all that in the ordinary exigencies of their business might require to be done promptly; that in this respect there was no difference between an ordinary partnership and a corporation; that there was sufficient evidence that Fisher (general manager) had authority to this extent from the Company, and that it was not necessary to show any authority under seal.

GENERAL.

	Case No.		Case No.
Railway Clauses, 8 *Vic.*, *cap.* 20, *sec.* 104	—	*Lygo* v. *Newbold* (1854)	482
Mitchell v. *Crassweller* (1853) ...	481	*Collier* v. *D. W. & W.* (1873) ...	483

Railway Clauses Act (1845), 8 *Vic.*, *cap.* 20, *sec.* 104.—"If any person be discovered either in or after committing or attempting to commit any such offence as in the preceding enactment mentioned, all officers and servants and other persons on behalf of the company, or such other company or party as aforesaid, and all constables, jailers, and peace officers, may lawfully apprehend and detain such person until he can conveniently be taken before some Justice, or until he be otherwise discharged by due course of law."

In *Mitchell* v. *Crassweller* (1853) Defendant's man, driving his master's cart, ran over Plaintiff and his wife in the street. The driver at this time was not driving the horse and cart in his master's business, but for his own pleasure; hence his master was held not liable for the consequences of his man's act.

In *Lygo* v. *Newbold* (1854) the Defendant was a carrier, and undertook to remove some household furniture for Plaintiff. She (Plaintiff) asked leave of the carrier's man to ride on the cart with the furniture. She did so ride, and the cart broke down, and Plaintiff's leg was broken. The carrier was held not liable.

In *Collier* v. *Dublin Wicklow and Wexford* (1873) Plaintiff's wife arrived at Booterstown Station seven minutes before the arrival of the last train at night. A porter opened a carriage door, but, it being a smoking compartment, she refused to enter, and the train went on without her. She would not leave the station, and the station-master, having to secure the station for the night, locked her up all night. It appeared Plaintiff was from home the particular night, so the Court held that he had suffered no deprivation of her services, and that damages could not be recovered.

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481. *Mitchell* v. *Crassweller.*—Action for damages for a conveyance running over a man and his wife. The action was against Crassweller, and his man was driving the cart. The master was held not liable. It appeared Crassweller's carman, having finished the business of the day, returned to his master's shop with the horse and cart and obtained the key of the stable, which was close at hand; but instead of going there at once and putting up the horse, as it was his duty to do, he, without his master's knowledge and consent, drove a fellow-workman to Euston Square, and on his way back the accident occurred. Held—That inasmuch as the carman was not at the time of the accident engaged in the business of his masters, they were not responsible for the consequences of his unauthorised act.—*Tried in Court of Common Pleas, January* 27, 1853.—*From Scott's Common Bench Reports, vol.* 13, *page* 237.

482. *Lygo* v. *Newbold.*—Action for fractured leg, and injury to extent of 35s. to household furniture. Plaintiff (a woman) engaged the carrier to remove some household furniture. She asked the carrier's man who came with the cart permission to ride on the cart with the furniture, to which he assented. The cart broke down, and injury to the Plaintiff and the furniture occurred. On the first trial the Lord Chief Baron was of opinion that although the Defendant might be responsible for the loss sustained for the damage to her furniture, he was not liable for the personal injury. Verdict for 35s., and leave to appeal as to the personal injury.

On the appeal case Chief Baron Pollock said—"On the present occasion the Plaintiff brought this accident wholly upon herself. She was of full age, and she got up into the Defendant's cart without any right to do so. She ought to have known that she had no authority to do that, and she must therefore take all the consequences of her own culpable conduct." Judgment for carrier.—*Tried in Court of Exchequer, January* 13, 1854.—*From Welsby, Hurlstone, and Gordon's Exchequer Reports, vol,* 9, *page* 302.

483. *Collier* v. *Dublin Wicklow and Wexford Railway.*—Action for arrest. Plaintiff's wife took a return ticket from Lansdowne Road to Booterstown. She was at Booterstown Station for the purpose of returning to Lansdowne Road seven minutes before the arrival of the last train. A porter opened one of the carriage doors for her, but when she found it was a smoking compartment she refused to enter, and the train went on without her. She was not prevented from leaving the station, but upon her refusing to leave it she was locked up for the night. It appeared that she had sustained no serious injury, and that her husband had been absent from home on the night in question. On the first trial the Chief Justice told the Jury that they could only give damages for loss sustained by the husband. The Jury gave a verdict for £50.

On the appeal case the Court held that it was a case for nominal damages. "The female Plaintiff did not take a cab, neither did she require a doctor, nor has there been any injuries sustained by the husband. There does not appear to have been

any deprivation of services, as the Plaintiff was not at home that night. He cannot, therefore, recover damages for the exclusion of the wife from the house that night." Verdict reduced to nominal damages.—*Tried in the Court of Common Pleas (Ireland), November* 18, 1873.—*From Irish Reports, Common Law, vol.* 8, *page* 21.

RAILWAY COMPANIES ARE LIABLE FOR THE ACTS OF THEIR SERVANTS IF THE ACT IS IN EXECUTION OF THE AUTHORITY GIVEN BY THE COMPANY, OR WITHIN THE SCOPE OF THE SERVANT'S EMPLOYMENT.

	Case No.		Case No.
Chilton v. *L. & C.* (1847)	484	*Poulton* v. *L. & S. W.* (1867) ...	504
Sharrod v. *L. & N. W.* (1849) ...	711	*Edwards* v. *L. & N. W.* (1870) ...	506
Eastern Counties v. *Broom* (1851)	497	*Allen* v. *L. & S. W.* (1870) ...	505
Roe v. *B. L. & C. J.* (1851) ...	502	*Van Den Eynde* v. *Ulster* (1871)	489
Tollemache v. *L. & S. W.* (1856)	485	*Bayley* v. *M. S. & L.* (1872) ...	500
Goff v. *Great Northern* (1861) ...	487	*Moore* v. *Met.* (1872)	490
Seymour v. *Greenwood* (1861) ...	486	*Kirkstall B. Co.* v. *Furness* (1874)	55
Barry v. *M. G. W.* (1865)	488	*Edwards* v. *Midland* (1880) ...	496

DIGEST.

In *Chilton* v. *London and Croydon* (1847) a passenger from Sydenham to London lost his ticket, and he offered to pay from Sydenham; but the fare from Croydon, the starting place of the train, was demanded. On his refusal he was locked up in a police station for twelve hours. The Court held the power of apprehending does not apply to the case of a penalty imposed by a bye-law, and it was clear that the sum demanded of Plaintiff was a fare, and not a penalty. Judgment against Company.

In *Sharrod* v. *London and North Western* (1849) Baron Parke said—"Our opinion is that in all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in an action on *the case* for want of skill or care of the agent."

In *Roe* v. *B. L. & C. J.* (1851) Plaintiff, owing to wrong information given him by a Company's clerk, travelled by a wrong train from Bangor to Chester on a return excursion ticket. At Chester 2s. 6d. excess was demanded, and, on his refusing to pay, the superintendent and a porter took him into custody and detained him. On the first trial he got £50 damages. On appeal, Chief Baron Pollock said—"The principle applicable to principal and agent, and master and servant, is that the master is not liable for the *tortious* act of the servant, unless he has either given him express directions or an implied authority to do the act; and the Company are therefore not liable in this case."

In *E. C.* v. *Broom* (1851) a passenger refused to give up his ticket, and was removed by force from the carriage, and then he assaulted the ticket collector. He was detained in Stratford Police Station. On appeal, the Court held that, in case the action might lie, "the act (of arrest), not done with the knowledge of the Company in the first instance, might have been ratified by them; but we are of opinion there was no evidence of such ratification in this case." Judgment for Company.

In *Tollemache* v. *London and South Western* (1856) the Plaintiff refused to give up his ticket at Kingston, and was detained. Baron Martin held that in the Company's bye-law there is not a word which authorises the imprisonment of a passenger by the Company for one-hundredth part of a minute for any purpose whatever. Judgment against Company.

In *Goff* v. *Great Northern* (1861) a passenger, by an innocent mistake, travelled on a return ticket out of date, and, having no money to pay the fare, was imprisoned for six hours. Justice Blackburn held that a railway company, though a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by the authority of the company; and it is not necessary that the authority should be

under seal. The verdict of the Court below for £50 damages was confirmed.

In *Seymour* v. *Greenwood* (1861) an omnibus conductor dragged a drunken passenger out of his omnibus with unnecessary violence, and threw him down in the middle of the street, and a cab passing at the time injured the passenger. The carrier was held liable because his conductor acted with brutality and did not exercise due care and consideration in removing the drunken man.

In *Barry* v. *Midland Great Western* (1865) Plaintiff had been detained some time on his journey owing to a train having broken down, and on arrival in Dublin he refused to give up his ticket or pay his fare unless he was told the cause of the detention. He was arrested and locked up in the police station for the night. He was discharged by the Magistrate with a caution, when he then gave up his ticket. On the trial for false arrest the Chief Baron directed a verdict for the Company.

In *Poulton* v. *London and South Western* (1867) a horse and man had returned to Romsey Station from a show; the horse was to be carried free, but arrived unentered, and the Romsey station-master demanded 6s. 10d. carriage, and detained the man half an hour until reply to a telegram arrived. On appeal, Justice Blackburn held that on the part of the station-master it was an act out of the scope of his authority, and for which the Company would be no more responsible than if he had committed an assault or done any other act which the Company never authorised him to do. Judgment for Company.

In *Edwards* v. *London and North Western* (1870) Holmes, a foreman porter, saw Plaintiff, a Company's policeman, removing boards from the Canada Dock Station one evening, and, thinking he was stealing them, gave Plaintiff into custody. The Magistrates discharged Plaintiff, and shortly after the Company dismissed him. On the first trial the Jury gave Plaintiff £100

damages for false arrest. On the appeal Justice Keating gave Judgment for Company, as Holmes was not acting within the scope of his authority.

In *Allen* v. *London and South Western* (1870) a booking clerk gave Plaintiff in change a two sous coin for a penny. Plaintiff refused it, and the clerk declined to change it, so Plaintiff reached over the counter and attempted to put his hand into the bowl of the till containing copper coins. He was given in charge and locked up in a police station all night. The Magistrates dismissed the case. On the final appeal case Justice Blackburn held—"It is quite clear that there was no evidence of an express authority by the Company to arrest Plaintiff." Judgment for Company.

In *Van Den Eynde* v. *Ulster* (1871) Plaintiff was in the booking-office at the Lisburn Station, and the booking clerk, being called out for a moment, thought on his return Plaintiff had a ticket in his hand which he had stolen. Plaintiff was detained and searched, but no ticket was found. On the first trial Plaintiff got a verdict of £75. On the final appeal the majority of the Court held that there was evidence that the Plaintiff was detained by the Company's servants upon the plea that he was attempting to travel by means of a stolen ticket without paying his fare, and that the detention of the Plaintiff under such circumstances was within the scope of the officials' authority, and that the Company were consequently liable for their acts.

In *Bayley* v. *Manchester Sheffield and Lincolnshire* (1872) a porter, being under the impression Plaintiff was in a wrong carriage, pulled him out as the train was about starting, and Plaintiff was roughly handled and injured. The porter on the first trial said he had no authority to do what he did; but the Jury disbelieved him, and gave a verdict for Plaintiff, which, on appeal, was confirmed.

In *Moore* v. *Metropolitan Railway Company* (1872) a passenger with a return ticket on the return journey

got out at a station one short of the actual destination, and he refused to pay 2d. excess unless he got a receipt. The inspector gave passenger in charge of a policeman, who detained him at the police station until he got bail. On appeal, Justice Blackburn held that the inspector was acting within the scope of his authority, and the Company were liable for false imprisonment, the Magistrates, on the first trial, having dismissed the charge.

In *Kirkstall Brewery Company* v. *Furness* (1874) Chief Justice Cockburn said—"I think it is impossible to say that a man who has the sole management of a railway station, and had authority to cause a person to be apprehended if he had reasonable and probable cause to suppose that a felony had been committed, could not have authority to give instructions to the police, and could not make such communications as would be admissible in evidence, just as if they were made by the principals."

In *Edwards* v. *Midland* (1880) the Company's detective officer arrested a porter on suspicion of stealing a parcel of watches. The Magistrates dismissed the case. On appeal, Justice Fry held that the Company's detective was acting within the scope of his authority, and the Company were responsible for his acts. Judgment against Company.

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484. *Chilton* v. *London and Croydon Railway Company.*—Action for damages for false arrest. Plaintiff took a first class ticket from Sydenham to London, and paid 1s., which ticket he somehow lost on the journey. On arrival at London the full fare from Croydon (1s. 3d.), from whence the train started, was demanded. Plaintiff refused to pay from Croydon, but offered to pay from Sydenham, and in consequence was arrested and taken to the police station, and detained twelve hours. The Company acted upon their bye-law, which set forth—

"That each passenger not producing or delivering up his ticket will be required to pay the fare from the place whence the train originally started."

By the Company's Act 5 Will. IV., cap. 10, sec. 106, the Com-

pany have power to make bye-laws and to impose a penalty not exceeding £5, and their bye-laws had been sanctioned on the 1st June, 1841, by the Lords of the Privy Council. The Company contended their bye-laws were reasonable, and that they were justified in arresting Plaintiff, not knowing his place of residence. Unless the Company possessed this power of arresting a passenger not producing his ticket on arrival at the end of his journey, the consequence would be that the train must be detained, much time must be lost, and the value of railway communication to the public considerably diminished. In the case of any party not producing his ticket, it would in such a case become necessary to follow him to his home, which would require a larger number of servants than the Company could afford to maintain. Plaintiff contended the Company had not the power of arrest for a breach of a bye-law; that the 163rd section of the Act directs that "all penalties or forfeitures inflicted or imposed *by the Act or by virtue of any bye-law made in pursuance*, &c., may, in case of non-payment thereof, be recovered in a summary way by order of one or more Justices of the Peace, &c., one half of such penalty or forfeiture to be paid to the informer, and the other half to the Company." Section 165 empowers "any officer or agent of the Company to seize and detain any person whose name and residence shall be unknown, &c., who shall commit any offence *against this Act*." Baron Parke said—"The Plaintiff is entitled to Judgment. The Company's counsel cannot get rid of the difficulty that this is not the case of a penalty (for breach of bye-law), but the mere demand of a fare. The bye-law may be defective in not making a party under such circumstances liable to a penalty; if so, the remedy is to alter the bye-law, and get it approved by the proper authority. The plea does not state that the Plaintiff was arrested for the purpose of being carried before a Justice of the Peace. The Act gives no right to arrest except for this purpose. The Plaintiff is entitled to succeed on the form of the plea, as it is plain that the sum demanded of him was a fare, and not a penalty, and the Company had no right to apprehend him." Barons Alderson and Rolfe concurred. Baron Platt also concurred, and said—"The power of apprehending does not apply to the case of a penalty imposed by a

bye-law." Judgment against Company.—*Tried in Court of Exchequer, June* 20, 1847.—*From Law Journal Reports, vol.* 16, *page* 89.

485. *Tollemache* v. *London and South Western Railway Company.*—Action for false imprisonment. The Plaintiff was a passenger from Wareham to Kingston, and refused to deliver his ticket on his arrival at Kingston, and was consequently detained. Baron Martin said—"The bye-law only empowers the Company to demand the fare when the passenger refuses to deliver his ticket; and if he refuses to pay the fare the bye-law goes on to provide for its recovery before a Magistrate, who has power to fine also, but there is not a word in the bye-law which authorises the imprisonment of a passenger by the Company for the one-hundredth part of a minute for any purpose whatever. The practice is to keep the doors locked while the officials are demanding the tickets, and though that might be strained in some sense into an act of imprisonment, yet it might be justifiable. But it is clear that a company had no right to detain the person of an individual passenger who had no ticket, avowedly for any such purpose as that contended for by Mr. Bovill. There must therefore be Judgment for the Plaintiff."—*Tried in Court of Exchequer, January* 16, 1856.—*From Law Times, vol.* 26, *page* 222.

486. *Seymour* v. *Greenwood.*—Action for £5 damages for assault. An omnibus conductor dragged a drunken passenger out of his omnibus with unnecessary violence, and threw him down in the middle of the street, and a cab passing at the same time injured the drunken passenger. On the first trial, at Liverpool Summer Assizes, Justice Blackburn held that the proprietor of the omnibus was responsible, and the Jury gave a verdict of £5.

On the appeal case Chief Baron Pollock said—"The Judgment must be against the carrier. The principle by which this question is governed is laid down in *Roe* v. *Birkenhead and Cheshire Junction Railway Company*, a case which, as far as I am aware, has never been overruled. The conductor was justified in obeying the lawful command of his master in removing a drunken man from the omnibus, but not in doing it with

brutality. It was his want of care in executing the command of his master which produced the mischief. The evidence showed that the servant was executing the command of his master with a want of that care and consideration which he was bound to exercise, particularly in a case of this description. The state of the law upon this subject has been very much expanded since the case of *Scott* v. *Shepherd* (2 Bl., 892), and of *M'Manus* v. *Crickett*. Public safety and convenience require that we should adopt the kind of decision to which we now give effect; for if we were to hold that the master was to be responsible only in cases of a negligent obedience to orders, persons would not be protected against many irregularities such as may happen in conducting the business of railways, against which it is extremely important they should be protected. That is not the present case, but the same considerations apply to it."

Baron Martin said—"The question is whether there was evidence on which the Jury was justified in finding that the act complained of was authorised by the master. There is no doubt that if a guard, in removing a drunken passenger, exercises unnecessary violence, the master is responsible for that as an act done in the course of his service in such a manner as to occasion injury to a third party, and according to the general principle the master is responsible. It is true that in the present case no special authority to do this very act was shown, but a master impliedly instructs his servants to do everything properly incident to the matter of his employment. The criterion, in determining the question of responsibility, is by inquiring whether the act was done by a servant in the course of his employment, and whether the mischief arose from the act being done negligently or in an improper manner. If so, the master is liable. It has been urged that this act was a trespass by the servant. What of that? A great proportion of the cases in which masters have been held liable were trespasses, such as collisions from negligent driving, &c. That is not the distinction. It is this: the master is not responsible for that which is a wilful and malicious act on the part of his servant. There was evidence to go to the Jury in this case." Judgment

against carrier.—*Tried in Court of Exchequer, January* 22, 1861.—*From Weekly Reporter, vol.* 9, *page* 518.

487. *Goff* v. *Great Northern Railway Company.*—Action for £50 for false imprisonment from 10 a.m. to 4 p.m. on Monday, 12th March. Plaintiff had been given into custody, having tendered a ticket out of date. He could not pay the fare demanded, seventeen pence, as he had but sixpence with him, but offered to leave his tools, he being a working carpenter. Plaintiff had taken a return ticket, King's Cross to Wood Green, on the Saturday, March 10th. It appeared Plaintiff's wife's sister had on Thursday, the 8th March, gone on a visit to Wood Green, and taken a return ticket from London. She had been persuaded to stop, and her return ticket having become unavailable, she put it on the mantelpiece. Plaintiff had also put his return ticket on the mantelpiece, and, in mistake, he took his sister-in-law's unavailable ticket. He told the Company's police inspector this. He was taken before the superintendent of the line, who said to the inspector, "I think you had better take him, but first you had better obtain the concurrence of the secretary." The police inspector then went out of the office, and in a few minutes returned, when he sent the Plaintiff to the Platt Street Police Station, where he was detained six hours. On examination before the Magistrates, the Plaintiff's story was found to be correct. The Company declined to compensate Plaintiff, and the case was tried at the Surrey Summer Assizes, 1860, when the Jury gave a verdict for £50. The Company appealed, when Justice Blackburn gave Judgment—"A railway company, though it be a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by the authority of the company; and it is not necessary that the authority should be under seal. Both these points were decided by the Court of Exchequer Chamber in *Eastern Counties* v. *Broom* (20 L.J., 196, Ex.). But it lies upon the Plaintiff to give evidence justifying the Jury in finding that the persons actually imprisoning him, or some of them, had authority from the Company to do so. In the case quoted the Court were of opinion that what was stated in the bill of exceptions in that

case was not sufficient evidence for that purpose. It has been argued that the case quoted and the case of *Roe* v. *Birkenhead Lancashire and Cheshire Junction Railway* (21 Law J., 9 Ex.) are binding upon us. These decisions were in 1851, while in 1853, in *Giles* v. *Taff Vale Railway Company* (23 L.J., 43 Q.B.), the Exchequer Chamber laid down principles also binding upon us. The question in this latter case was whether there was evidence sufficient to prove a conversion by the Company of certain quicks (detention of goods). When the quicks were demanded the clerks made reference to Fisher, the general superintendent of the line, and *he refused to deliver them up.* Nothing was stated in the bill of exceptions to show what the authority of a general superintendent was. No doubt Fisher was guilty of a conversion; the question was *whether there was sufficient* evidence of his authority from the Company to make them liable. The seven Judges who tried the case all agreed that there was sufficient evidence. Justice Maule said—'There ought to be some one with authority from the Company to deliver up or refuse to deliver up goods. To whom was the Plaintiff to apply except the station-master and superintendent, and who else was to have that authority?' We think the same exigencies of the *traffic* is applicable in principle to all exigencies that may be naturally expected in the ordinary course of the business of the Company. We think the Company would have a right to blame their officers if they did not on their behalf apprehend a person if it seemed a fit case; and if so, the Company must be answerable if, in the exercise of their discretion, those officers on their behalf apprehend an innocent person. The rule was moved on the ground that the damages, £50, were excessive. They were liberal, certainly, and we should have been better pleased if they had been smaller, but we do not think the excess so great as to induce us to order a new trial." Judgment against Company.—*Tried in Court of Queen's Bench, February* 13, 1861.—*From Law Journal Reports, vol.* 30, *page* 148.

488. *Barry* v. *Midland Great Western Railway Company.*—Action for false imprisonment, Plaintiff having been

given in charge of a policeman and locked up all night for refusing to give up his ticket or pay his fare. He was brought before the Magistrate next morning, and on then giving up his ticket he was discharged with a caution. He took a third class ticket, Ballywillan to Dublin. He changed carriages at Mullingar Junction, and was detained some time owing to the main line train having broken down. He refused to give up his ticket at Dublin unless an explanation was given him as to the cause of the detention (probably with a view to a claim). The fare (7s. 7d.) from Ballinasloe, from where the main line special started, was demanded, while the fare from Ballywillan was 7s. 1d. Plaintiff's counsel claimed a verdict because 6d. more was demanded beyond the proper fare. The Chief Baron directed a verdict for Company, reserving liberty for Plaintiff to appeal and for Company to contend that Plaintiff was bound to tender the true fare from the station from which he started if Company demanded too much.—*Tried before Chief Baron Pigott in Court of Exchequer, Dublin, 1st November*, 1865.—*Irish Jurist, vol.* 18, *page* 38.

489. *Van Den Eynde* v. *Ulster Railway Company.*—Action for false arrest. The Plaintiff was in the habit of purchasing horses for the French and Belgian Governments for the last fourteen years. He went to the Lisburn Station of the Company's railway when a passenger train was about to start, and having entered the apartment of the ticket office, where the clerk was then issuing tickets, he approached the ticket press and asked for a ticket. He did not get or pay for one. A person outside the office called the Plaintiff out just as the train was about to leave the platform, and as the Plaintiff was leaving the ticket office the ticket clerk, erroneously believing that he had seen a ticket in the Plaintiff's hand, detained him, and asked him for the ticket and searched him, and subsequently charged the Plaintiff in the presence of the station-master with having stolen the ticket, whereupon the Plaintiff was also searched by the station-master. In an action brought by the Plaintiff against the Railway Company for assault and false imprisonment, it was held, affirming the decision of the Court of Queen's Bench, that there was evidence

of the Defendants' liability for the acts of the ticket clerk and station-master, and that the learned Judge was right at the trial in refusing to direct a verdict for the Defendants on the ground that there was no evidence that they committed or authorised the trespass proved.

Held by Chief Baron Pigott, Barons Fitzgerald and Hughes, and Justice Morris—That there was evidence that the Plaintiff was detained by the Company's servants upon the plea that he was attempting to travel by means of a stolen ticket on the Company's railway without paying his fare, and that the detention of the Plaintiff under such circumstances was within the scope of the officials' authority, and that the Company were consequently liable for their acts.

Held by Chief Justice Monaghan, Chief Baron Pigott, and Justice Lawson—That inasmuch as the ticket was the property of the Company under the charge of the ticket clerk and station-master, it was within the scope of their employment to detain the Plaintiff in order to regain the ticket, if they had reasonable grounds for believing that he had abstracted and was carrying it away from the custody of the ticket clerk, and that they had an implied authority from the Railway Company to do so.

Held by Chief Baron Pigott—That whether the Plaintiff's detention be considered as the result of an arrest for feloniously taking, or as a detention for the purpose of regaining the ticket which the ticket clerk and the station-master believed he had, there was evidence that their object was to regain the property of their employers under their charge, and if in endeavouring to do so they made a mistake in what they did, their employers were not thereby exempted from the responsibility of their acts.

On the first trial the Jury gave the verdict against the Company for £75.

On the appeal to the Queen's Bench this was allowed to stand, and on this further appeal to the Exchequer Chamber the decision was affirmed.

Judgment against the Company.—*Tried in the Court of Exchequer Chamber, January* 19 *and February* 20, 1871.—*From Irish Reports, Common Law, vol.* 5, *page* 328.

490. *Moore* v. *Metropolitan Railway Company.*—Action for damages for false arrest. Plaintiff, on 3rd August, 1871, took a return ticket from Notting Hill Gate Station to the Mansion House Station. On the return journey he got out at Edgware Road Station, one station short of Notting Hill Gate. The ticket collector demanded 2d., the fare from Notting Hill Gate to Edgware Road. The Plaintiff refused to pay the 2d. excess unless a receipt was given him. This was refused, the collector saying receipts were not given on that railway. The inspector was sent for and the matter explained, and he sent for a policeman, and Plaintiff was taken to the police station and detained until he procured bail. He was next day brought before the Magistrate, when the charge was dismissed. The case was first tried before Justice Lush, at the Middlesex Sittings, when the Judge ordered a non-suit, there being no proof the inspector had any authority from the Company to give Plaintiff into custody. The Plaintiff appealed, and on the appeal case Justice Blackburn said—"I think brother Lush made a mistake in non-suiting the Plaintiff, as the case fell completely within that of *Goff* v. *Great Northern Railway Company*. The principle had been laid down in *Giles* v. *Taff Vale* that where a railway company are carrying on business there are certain things necessary to be done for the company, and certain things which may and ought to be done for the protection of the company, and things which, if done at all, must be done at once. The company ought to have a person upon the spot to do those things, a person with common prudence and common sense, with an authority to decide whether the thing shall be done or not; and if, intending to exercise his authority properly, he makes a mistake and does that which he is not justified in doing, the company are responsible, because he was their agent. The presumption that such a person has authority is to be rebutted by the company showing that he had not. It is upon the ground that the inspector of the Company made a mistake that the Company are responsible. Sections 103 and 104 of 8 & 9 Vic., cap. 20, show that the Plaintiff should not have been non-suited, as in cases of fraud these sections are quite enough to show that the act of the inspector was one of those acts which in a proper case might have been

done by an official for the benefit of the Company." Justice Mellor concurred. Justice Lush concurred that the view he had at first taken of the facts was erroneous. Judgment against Company.—*Tried in Court of Queen's Bench, November* 26, 1872.—*From Law Journal Reports, vol.* 42, *page* 23.

Malicious Prosecutions.

	Case No.		Case No.
Stevens v. *Midland* (1854)... ...	491	*Henderson* v. *Midland* (1871) ...	494
Hunt v. *S. S.* (1857)	492	*Kelly* v. *Midland G. W.* (1872)	495
Green v. *General O. Co.* (1859)...	493	*Edwards* v. *Midland* (1880) ...	496

DIGEST.

In *Stevens* v. *Midland* (1854) Plaintiff was indicted for stealing one of the Company's tarpaulins which was found upon his cart. It appeared some time before one of the Company's servants had lent Plaintiff the tarpaulin to cover some goods the Company had carried and delivered him. The Plaintiff was acquitted. He then sued the Company for malicious prosecution. Baron Alderson held that a Company could not act maliciously through its servants. Judgment for Company.

In *Hunt* v. *South Staffordshire* (1857) Plaintiff had been wrongly summoned for a passenger fare instead of his brother. Chief Baron Pollock held that a malicious prosecution had not been made out.

In *Green* v. *General Omnibus Company* (1859) it was held by Chief Justice Erle that an action will lie against a corporation for a wilful and intentional wrong the same as against an individual.

In *Henderson* v. *Midland* (1871) Plaintiff was a lad assisting Clarke, a drayman. A quantity of rail-ends carted by these two were found to be deficient, and they were arrested, but the case was not proved before the Magistrates. Henderson then sued for damages for malicious prosecution. On appeal the Court held

the non-suit at the Leeds Assizes was wrong, and that there was evidence for the Jury "of a want of reasonable and probable cause," and there must be a new trial. Baron Bramwell dissented.

In *Kelly* v. *Midland Great Western* (1872) Plaintiff, an excess luggage foreman, had been tried for taking from a passenger 12s. for excess luggage and giving the passenger a receipt for only 6s., and not accounting for the 6s. difference. On this trial he was acquitted, and then he brought an action for false arrest and malicious prosecution. After several trials, Plaintiff was finally unsuccessful. (*See case.*)

In *Edwards* v. *Midland* (1880) a porter (Plaintiff) had been arrested on suspicion of stealing a parcel of watches. The Magistrates dismissed the case, and Edwards then brought an action for malicious prosecution. Justice Fry held that the Company's detective policeman who made the arrest was acting as an officer of the Company within the scope of his employment and of the incorporation of the Company. Judgment against Company.

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491. *Stevens* v. *Midland Railway Company and Lauder.*—Malicious prosecution, Plaintiff having been indicted for stealing a tarpaulin. Plaintiff was a mustard and oatmeal manufacturer at Stroud. The Defendants were the Midland Railway Company and Lauder, their superintendent of police. Some time before, Plaintiff was a grocer at Cheltenham, and had received some goods from the railway, when one of the Company's servants, at Plaintiff's request, put one of the Company's tarpaulins over the goods to protect them from wet. It appears the tarpaulin was never returned. Plaintiff's cart was delivering some goods at Gloucester from the docks to the station, and the tarpaulin, with the Company's initials on it, was found on the cart. The Defendant Lauder, without, as it appeared, having any authority from the Company, but accompanied by their solicitor, made two or three applications to the Magistrates for a warrant against the Plaintiff, which was refused, and at last preferred a bill before the Grand

Jury, and, a bill being found, apprehended the Plaintiff under a Bench warrant. The Plaintiff was tried and acquitted. For the Defendants it was contended that no action for a malicious prosecution would lie against the Defendants, who were a corporation, and that Lauder, being their servant only, was not liable for what he had done in that capacity. The case having been submitted to the Jury, a verdict was found for the Plaintiff against all the Defendants. The Company appealed, and on the appeal case Baron Alderson said—"How can a railway company act maliciously? They act by their agents, but they do not make persons their agents to do wrong. The directors are liable if they direct their servant to institute a prosecution maliciously, but they are not liable constructively for an act like the present, of which they know nothing. The Company cannot be considered to have acted *malo animo*, as they have no animus. The directors are responsible for the act, but not for the animus. The action for a malicious prosecution depends upon the animus. You are entitled to retain the verdict as against Lauder. I think there was evidence against Lauder of acting maliciously, and without reasonable and probable cause. I think the Company are not liable." Baron Platt concurred, saying there was no evidence of any command to indict the Plaintiff given by the Company to Lauder. Baron Martin concurred. Judgment accordingly.—*Tried in the Court of Exchequer, June* 22, 1854.—*From Law Journal Reports, vol.* 23, *page* 328.

492. *Hunt* v. *South Staffordshire Railway Company.*—Action for £17 12s. 6d., railway fares, London to Stafford and back, and solicitor's expenses, &c. Plaintiff had been summoned in mistake instead of his brother for riding in one of the Company's carriages without paying his fare. The County Court Judge, before whom the claim for expenses afterwards came, declined to deal with it, holding that it could be only sustained on a plea of malicious prosecution, and the County Court had no authority to try such a case. Plaintiff appealed. Chief Baron Pollock held that a malicious prosecution had not been made out, nor had the Company agreed to pay Plaintiff's expenses. Verdict for Company.—*Tried in Court of Ex-*

chequer, June 11, 1857.—*From Law Journal Reports, vol.* 26, *page* 374.

493. *Green* v. *The London General Omnibus Company.* —Action for interfering with the Plaintiff's business of a carrier of passengers by driving the omnibuses of the corporation in such a manner as to molest him in the use of the highway.

Chief Justice Erle said—"In this case we are of opinion that Judgment ought to be for the Plaintiff. There is a demurrer by the Defendants, and on that demurrer we are called upon to give our opinion whether the action lies. The ground of the demurrer is that the charge is a charge of a wilful and intentional wrong, and that a corporation cannot be guilty of such a wrong, and therefore that the action does not lie. But I should state that the whole of the acts that are charged against the Defendants are acts connected with the driving of their vehicles, and this is a Company incorporated for the purpose of driving omnibuses, and therefore the actual things done by the Defendants are acts within the purpose of their incorporation. Unless they had been wrongfully done, of course there could be no ground of complaint; but, being wrongfully done, we think clearly the action lies, and that there are abundant authorities to show that, under these circumstances, the action will lie. I take the whole tenor of the authorities, from *Yarborough* v. *The Bank of England* down to the case of *Whitfield* v. *South Eastern Railway*, to show that an action for a wrong does lie against a corporation where the thing done is within the purpose of the incorporation, and that it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. The doctrine that was relied upon by Mr. Gifford is rather more of a quaint than a substantial form—that because a corporation has no soul, therefore it is incapable of a malicious intention. We do not, in the smallest degree, interfere with prior decisions; but, on the contrary, there are numerous authorities—of which *Yarborough* v. *The Bank of England* (where there was a well-considered and elaborate Judgment, going over all the previous cases) is by no means the first—in support of the principle upon which we rely; and I may add, as an additional

reason for our decision, the inconvenience to the public that would arise if we were to hold that these companies, incorporated for the purpose of trade, had a restricted limitation put upon their liability by reason of such incorporation, and were exempt from responsibility because they intentionally wronged the public. We think it extremely important, where such companies admit that they have, in fact, intentionally committed a wrong, that the public should have a remedy against them, and not be driven to an action against their servants and others whom they have employed, and who may be entirely incapable of giving the recompense which the law may award." Judgment for Plaintiff.—*Tried in Court of Common Pleas, November* 18, 1859.—*From Law Journal Reports, vol.* 29, *page* 13.

494. *Henderson* v. *Midland Railway.*—Action for damages for malicious prosecution. The real Plaintiff was a boy of sixteen, whose father brought the action for him. This lad assisted a man named Clarke, who was a drayman employed by the Company to cart some steel rail-ends from the Sheffield goods station to the consignee's works in Sheffield. When the quantities were made up, a considerable number of these rail-ends alleged to have been delivered to Clarke were missing. A Company's detective inquired into the matter, which resulted in Clarke and Henderson being arrested. On being brought before the Magistrate, the case was remanded for a week; and when it came on again no evidence was offered by the Company to prove the case, and Clarke and Henderson were liberated.

Henderson then commenced an action for malicious prosecution, which was first tried before Justice Brett, at Leeds Spring Assizes. The Judge directed a non-suit to be entered, being of opinion that there was no evidence of want of reasonable and probable cause or malice, and that Plaintiff was bound to give (*Purcell* v. *Macnamara*, 9 East, 363) positive evidence of want of reasonable and probable cause, which he had not done, and that there was evidence here that evidence was given before the Magistrate which the Plaintiff had not produced.

Plaintiff appealed, when Chief Baron Kelly and Baron

Cleasby held that the non-suit was wrong, and that there was evidence for the Jury of a want of reasonable and probable cause, and there must be a new trial; and this was the Judgment of the Court.

Baron Bramwell dissented, and said—"First, the evidence objected to was admissible on the ground that it was given at the time when the Plaintiff was in the dock and had a right to cross-examine the witnesses, and that it was evidence which the Defendants were entitled now to give as showing that the Plaintiff knew what the cause was on which they had acted. Secondly, the Judge was right in holding that the Plaintiff had failed to show a want of reasonable and probable cause; and it was for the Plaintiff to show what the alleged cause on which the Defendants acted was, and that it was unreasonable and groundless. Thirdly, there was no evidence of malice against anyone. Fourthly, the action will not lie against a corporation, which is incapable of feeling, or suffering from, or being actuated by malice.—*Tried in Court of Exchequer, May* 23, 1871.—*From Law Times Reports, vol.* 24, *page* 881.

495. *Kelly* v. *Midland Great Western Railway Company.* —Plaintiff, a former servant of the Company, claimed damages for malicious prosecution and false arrest. Many trials took place over this case, the facts being as follows:—Plaintiff was originally in the Royal Irish Constabulary, and was a pensioner from that force; he was employed by Company as a foreman porter to weigh harvestmen's luggage and collect excess. On 4th October, 1870, a man named Sweeney, a hawker, and in appearance somewhat like a returned American emigrant, accompanied by his wife, was proceeding from Dublin to Westport by harvestmen's train. Sweeney alleged he paid Plaintiff 12s. for luggage just as the train was moving off from platform, and received a receipt in the carriage for only 6s., which, however, he did not notice at the time. At Westport the station-master re-weighed the luggage, and demanded 6s. more than the ticket specified, when Sweeney discovered, as he alleged, he had received a receipt for 6s. when he paid 12s. On 14th October he wrote a complaint from his house at Achil, 40 miles beyond Westport, to the Company's manager. Plaintiff was

questioned, and suspended from duty pending Sweeney being sent for. On 5th November Sweeney arrived and made a sworn information, upon which a warrant was obtained and Plaintiff arrested on a Saturday. Before this, however, and on the 29th October Plaintiff wrote a letter objecting to his suspension, and maintaining that the Company's manager, when suspending him, said—"You need not say a word; you are guilty, and you will be suspended." Plaintiff in his letter threatened legal proceedings, and he was then paid arrears of wages and dismissed. Plaintiff was tried before Recorder in Dublin, when Sweeney and his wife swore to the payment of 12s., but the Jury acquitted him. After this trial a witness, a passenger in the same carriage, corroborated the testimony of Sweeney and his wife as to the paying of the 12s., he seeing the money pass. Had he been produced on the first trial, it is probable a conviction would have been obtained. Plaintiff then brought an action against the Company, which was tried in the Consolidated Nisi Prius Court, when he obtained a verdict for £50. On appeal, this verdict was set aside on the ground of misdirection. A new trial then took place before the Chief Justice, in Queen's Bench, 8th November, 1872. The Company pleaded (1) there was no evidence of the absence of *reasonable and probable cause* (of the charge of stealing the 6s.); (2) there was no evidence of malice by Company; (3) that an action for malicious prosecution did not lie against a corporation aggregate. The Chief Justice declined to non-suit Plaintiff, and allowed the case to go to the Jury, when a verdict was given for £200 damages against the Company. A conditional order was obtained to show cause to set aside this verdict on ground of misdirection, and to arrest Judgment. In this proceeding Plaintiff pleaded there was no "reasonable or probable" cause for prosecuting him, and that the prosecution had not been proceeded with until he, being suspended peremptorily, demanded an inquiry; and that he was arrested on a Saturday night, when he might have been served with a summons to appear and answer the charge, and not arrested at all. The Company pleaded (1) that no such action could be maintained against a corporate company; (2) that the Plaintiff failed to prove an absence of probable cause, while the Company proved it to exist; (3) that there

was no evidence of malice. Plaintiff also pleaded that the rigid rule of the old law as to liability of a corporate body in such case should be relaxed and this form of action permitted. Chief Justice Whiteside delivered a lengthy Judgment. He said they (the Judges) followed the example of Chief Baron Kelly in *Henderson* v. *Midland Railway Company* (24 L.T., N.S., 881) in giving no decision upon the point of whether a corporate body could be sued for malicious prosecution. Baron Kelly said it was a hardship involved in a company having the power to prosecute a man in the absence of "reasonable and probable cause" without themselves being liable to be sued, giving a company power to commit acts of oppression really painful to contemplate. Baron Bramwell, in same case, held that a corporation is incapable of feeling, or suffering from, or being actuated by malice. Chief Justice Whiteside said it was only fair to the Company's manager to state that he procured the warrant in consequence of a warning he had received from a policeman. On the plea of "reasonable and probable cause" the Judges considered the evidence of the Company's solicitor decisive, as he swore he had all the evidence laid before him and he carefully examined it. The Court ruled that Plaintiff had given no proof of an absence of "reasonable and probable cause," while the Company gave abundant proof of the existence of such cause, "and therefore we order a new trial."—*Tried in Queen's Bench, Nov.* 8, 1872.—7 *Irish Reports, Common Law, page* 8.

In the face of this Judgment Plaintiff did not take a new trial against the Company, but he brought a similar action against the Company's manager, which was tried in the Queen's Bench, 10th, 11th, and 12th February, 1873, before a Special Jury, for false arrest and malicious prosecution. Ten questions, with a view of exhausting all possible future litigation, were submitted to the Jury, who answered them all in Defendant's favour, and a verdict was found accordingly.—*Kelly* v. *Ward.*

496. *Edwards* v. *Midland Railway Company.*—Action for damages and false arrest. Plaintiff, William Edwards, was employed on the Midland Railway. The Company had been robbed, at Cheltenham, of several parcels of watches; Edwards was suspected, and was arrested by the Company's detective,

Shaw, in a theatre in London. Edwards was taken to Cheltenham before two Justices, who dismissed the case. Edwards was under arrest for three days. He then brought an action against the Midland Company and Shaw for malicious prosecution. The case was first tried at Gloucester Assizes, before Justice Fry and a Special Jury, who gave a verdict of £150 against the Company. A point of law was raised that such an action could not be brought against a railway company, and this point was reserved for argument in London. Justice Fry, in giving Judgment, said—"The case of *Whitfield* v. *South Eastern*, which was in reality an action against the Electric Telegraph Company, shows that an action for a wrong will lie against a corporation where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual. Can it be said that if the railway police whom the Company employ conduct a prosecution in the performance of their duties as officers of the Company, it is not done in the scope of the incorporation of the Company? Suppose a case: A private partnership carries on business; one of their agents maliciously prosecutes a particular person; all the partners are liable. The same partners shortly afterwards incorporate themselves under the provisions of the Limited Liability Acts; the same servant maliciously prosecutes another person, and the corporation is not liable. That does not seem a very intelligible or reasonable conclusion. It seems to me I am bound to hold that the Company may be responsible for malicious prosecution; and that being the only point which, according to my understanding, was reserved for further consideration, I am bound to give Judgment for the Plaintiff for the damages found by the Jury, £150, with costs." Judgment against Company.—*Tried in the Chancery Division, December* 16, 1880.—*From Law Times Reports, vol.* 43, *page* 694.

Ejection of Passengers from Carriage, or in other Manner Committing Assaults.

	Case No.		Case No.
E. C. v. *Broom* (1851)...	497	*Bayley* v. *M. S. & L.* (1872) ...	500
Glover v. *L. & S. W.* (1867) ...	498	*Menzies* v. *Highland* (1878) ...	501
M'Carthy v. *D. W. & W.* (1870)	499		

DIGEST.

In *Eastern Counties* v. *Broom* (1851) Plaintiff refused to give up his ticket or pay his fare, and was removed by force from the carriage. The Plaintiff obtained a verdict for £50 for assault, which, however, on appeal, was reversed.

In *Glover* v. *London and South Western* (1867) Plaintiff was travelling without a ticket, and refused to pay his fare, and was forcibly removed. In an action for assault the Jury gave him damages 20s.; and for his race glass, which was lost during the struggle, the Court, on appeal, refused to hold the Company liable.

In *M'Carthy* v. *Dublin Wicklow and Wexford* (1870) Plaintiff got into a train at one station beyond the station from which his return ticket was available. He was warned not to get in. He was ejected from the carriage by the Company's servants. Chief Justice Monaghan, on appeal, said—"We think, under the circumstances, the Company's servants were justified in removing the Plaintiff from the carriage, where he had no right to be, and where, in fact, he was a trespasser."

In *Menzies* v. *Highland* (1878) Plaintiff persisted in travelling on a Sunday with a return ticket not available, and, refusing to pay his fare, was forcibly removed from the carriage. He claimed £50 for the assault. Lord Ormidale, in the Court of Session, held that Plaintiff refusing to leave the carriage was, by the Railway Clauses Act, such a hindrance to the Company in the use of the railway as entitled them summarily

to interfere to "remove such hindrance." Judgment for Company.

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497. *Eastern Counties Railway Company* v. *Broom.*— Action on the ground of *trespass*, owing to Plaintiff, when refusing to give up his ticket or pay his fare, being removed by force from a carriage and being subsequently detained in Stratford Police Station. After removal from carriage Plaintiff, in revenge, assaulted Richardson, the ticket collector, and was given into custody. It was alleged that Plaintiff was intoxicated at the time. The report does not clearly detail the result of the proceedings before the Magistrates, but it is to be inferred the Company did not get a conviction. The action was tried before Chief Baron Pollock, at Westminster, on 23rd June, 1849, who left it to the Jury, and they gave a verdict for £50. The Company appealed, and lodged a bill of exceptions. Justice Patteson gave Judgment, and the Court (Justices Patteson, Wightman, Maule, Erle, Williams, and Talfourd) held that "in the case the action might lie, and the act (of arrest), not done with the knowledge of the Company in the first instance, might have been ratified by them; but we are of opinion there was no evidence of any such ratification, and that the direction of the Chief Baron was wrong in this respect." Judgment reversed and for the Company. The following principles were evolved out of this case :—

1. If a servant of a corporation aggregate commit an assault by the authority of the corporation, an action of trespass for assault and battery may be maintained against the corporation.

2. It is not necessary that the servant should be authorised to do the act by instrument under the seal of the corporation.

3. If an assault be committed on behalf and for the benefit of a corporation aggregate, the corporation may ratify the act of the agent, and if they do so they render themselves liable to an action of trespass for the assault.

4. If a servant of a railway company, acting on behalf of the company, assault and imprison a passenger to compel him to pay his fare for riding in the carriages of the company, the act of the servant is one for the benefit of the company, and may

be ratified by them.—*Tried in Court of Exchequer, February 5*, 1851.—*From Law Journal Reports, vol.* 20, *page* 196.

498. *Glover* v. *London and South Western Railway Company.*—Action for the value of a pair of race glasses left in a carriage and lost. Plaintiff was charged by a ticket collector with travelling without a ticket and refusing to pay his fare or leave the carriage. Plaintiff was forcibly removed. He brought an action for assault, and the Jury gave him 20s. damages, with leave to move to increase the amount by the value of the glasses. This trial took place at the Middlesex Sittings. On the appeal case Justice Lush said—"There is no evidence that the glasses were in the custody of the Company as carriers, therefore the count for taking and converting the glasses must fail. The only question is whether the loss of the glasses is, according to the ordinary rule, a damage immediately resulting from the wrongful act of the Company in removing Plaintiff from the carriage. The Plaintiff, in substance, says that he was forced out of the carriage and left the glasses on the seat. What he says is not enough to show that he was prevented by violence from taking care of them. I think, therefore, that the Company are not responsible for a loss which is not proved to be the natural result of what they did." Chief Justice Cockburn concurred. Judgment for Company.—*Tried in Court of Queen's Bench, November 5*, 1867.—*From Law Journal Reports, vol.* 37, *page* 57.

499. *M'Carthy* v. *Dublin Wicklow and Wexford Railway Company.*—Action in respect of a passenger travelling without a ticket. Plaintiff travelled from Dublin to Dundrum Station, and got out at Dundrum. On his return he had a right to get in at Dundrum, and to be conveyed back from there to Dublin. Instead of doing so, he walked on to Stillorgan Station, beyond Dundrum. Before getting into the train at Stillorgan, he was told that he would not be allowed to travel without having obtained a proper ticket. However, he took his seat, when he was removed by the Company's servants.

The case was first tried in the Court of Queen's Bench.

On the appeal case Chief Justice Monaghan reversed the decision of the Court of Queen's Bench, saying—"We think that under the circumstances the Company's servants were quite justified in removing the Plaintiff from the carriage, where he had no right to be, and where, in fact, he was a trespasser." Baron Fitzgerald said—"In the previous trial the Chief Justice directed the Jury, in effect, that the Plaintiff had a ticket within the meaning of the bye-law. This was, in my opinion, a mistake." Rule absolute for a new trial.—*Tried in the Court of Exchequer Chamber, May* 7, 1870. —*From Irish Reports, Common Law, vol.* 5, *page* 244.

500. *Bayley* v. *Manchester Sheffield and Lincolnshire Railway.*—Action for assault and injury in removing Plaintiff (a passenger) from a carriage under a mistake. The Plaintiff, having his ticket and being in a carriage on the railway, inquired of the porter whether he was in the proper train for his destination. The porter fancied he was not, and so informed him, and the train having either started or being about to start, the porter pulled the Plaintiff out of the carriage, and in doing so seriously injured him. The porter, in order to exculpate the Company, contradicted the Plaintiff's statement, and also said that he had no authority to do what was alleged. The Jury on the first trial disbelieved him, and gave a verdict for Plaintiff, and the Company had leave to appeal.

On the appeal case Justice Willes said—"Against wilful trespassers the porter would have a power of removal under the Act for Regulating Railways, 3 & 4 Vic., cap. 97, sec. 16. If the rules (bye-laws) do not impliedly give such power, which it seems they do, it is at least a question for the Jury whether a porter who is to turn his hand to anything, exercising upon a railway in the supposed 'interests of the Company' the power of removing a passenger from the train, did so under a general authority to remove trespassers. If the Jury found in the affirmative, then the Company are liable for an abuse of the authority. There was evidence of an authority to remove a person in a wrong carriage (different to the one corresponding with their ticket) abused by a blundering servant of the Company in pulling the Plaintiff out of the right one in the

supposed 'interests of the Company.'" Judgment against Company.—*Tried in Court of Common Pleas, June* 19 *and July* 5, 1872.—*From Law Journal Reports, vol.* 41, *page* 278.

The Company appealed to the Court of Exchequer Chamber, where the previous Judgment of Court of Common Pleas was affirmed, as it was held that there was evidence of the porter having acted within the scope of his authority and abused it, and that the Company were responsible.—*Law Journal Reports, vol.* 42, *page* 78.

501. *Menzies* v. *Highland Railway Company.*—Action for £50 damages and £1 12s. 6d. post-chaise expenses by Sir Robert Menzies against the Highland Railway. On *Friday*, May 4, 1877, Plaintiff purchased at Aberfeldy a first class return ticket, Aberfeldy to Perth, Plaintiff intending to proceed on from Perth to Edinburgh. This return ticket was a special return (or sort of excursion ticket), available on a Friday and to return on Saturday or the following Monday, but *not available on Sunday.* The Company posted notices that the tickets were not available on Sundays. Plaintiff, who probably returned to Perth on Saturday night, took his seat at Perth on Sunday morning in the mail train going northwards. This train did not go to Aberfeldy, but it stopped at Ballinluig, and Ballinluig is the junction for Aberfeldy, which is on a small branch line. On the examination of tickets at Perth Plaintiff produced the half return ticket, Perth to Aberfeldy. The ticket was marked "Saturday fare." Plaintiff was told he could not travel on that ticket, as it was not available and the train did not go to Aberfeldy. Plaintiff insisted upon going to Ballinluig in the train. He would neither pay the fare nor leave the carriage, but gave his name and address. However, two ticket collectors and two porters ejected him with the least possible force from the carriage. He then took a post-chaise to Aberfeldy, and sued the Company. He first sued in the Court of the Sheriff Substitute on 18th October, 1877, when the Judgment was for the Company. Plaintiff then appealed to the Court of the Sheriff, and obtained a Judgment for £21 damages. The Company then appealed to the Court of Session, when Lord Ormidale said—"The publication made

by the Company of their regulations as to the special return tickets was, in my opinion, all that was necessary. I must therefore hold that the Plaintiff had all the notice of the regulations he was entitled to or that it was incumbent upon the Company to give him, and that he must just take the consequences of an infraction or attempted infraction of them. He was made aware at Perth by the Company's servants, in the most unmistakable manner, that his ticket did not entitle him to travel to Ballinluig by the train in which he had taken his seat. If the Plaintiff had no right (as I hold he had not), or, in other words, was not entitled in virtue of his ticket to travel by the train from Perth to Ballinluig, the Company had a clear and undoubted right to insist on his leaving the carriage before the train started, and his refusal to do so occasioned such 'a hindrance to the Company in the use of the railway' as entitled them in terms not merely of a bye-law or regulation, but of the statute itself (sec. 102, Railway Clauses Act—Scotland), 'summarily to interfere' 'to remove such hindrance.' I can therefore see no good reason to doubt but that the course which was followed was the right one, and that the Company's servants at Perth had no alternative but to enforce, as they did, the regulations of the Company, and with great propriety and moderation, keeping in view that they were set at defiance by Plaintiff.

Lord Gifford concurred, and said:—"Every courtesy was observed towards Sir Robert. The guard offered to procure a ticket for him, without even troubling him to rise from his seat, but he would listen to no such proposal. He claimed his absolute right to travel on the return ticket which he had presented, and, rather than pay three shillings under protest, he preferred to be ejected from the train. It was his part, as the man of education and position, not to insist upon putting a subordinate in what might be a false or unpleasant position with his employers. It was his part, far more than that of the railway porters, to yield for the time, even if he was right. Questions as to rights under return tickets do not depend upon express enactment of statute, provided the maximum fares allowed to be exacted by a railway company are not exceeded. I am not aware of any rule—certainly none was

quoted—compelling this Railway Company, or any other Railway Company, to issue return tickets at all, or prescribing what shall be the rights of passengers under such tickets. I think it quite clear that the Railway Company may attach to return tickets any legal and reasonable condition. If, in the present case, Sir Robert's return ticket had on it the words 'Not available on Sundays,' as is the case with similar tickets now issued, I think this would have excluded all question. I think everyone who buys a return ticket, or, indeed, any kind of ticket, is bound to satisfy himself of the conditions on which it is issued. A wrong ticket for a different journey is not a ticket at all, any more than an expired ticket would be, or a ticket for a different railway. It can make no difference to the question that Sir Robert was known to the railway porters or officials. There is not one law for a person whose name and position is known, and another for a person who happens to be an entire stranger from distant parts. *The Railway Company might have shunted the carriage off and left it behind, transferring any other passengers to other parts of the train.*" Lord Justice Clerk also concurred. Judgment for Company, with all costs.—*Tried in Court of Session, Second Division, June* 8, 1878.—*From Scottish Law Reporter, vol.* 15, *page* 608.

WHERE A COMPANY'S SERVANT EXCEEDS HIS AUTHORITY, THE COMPANY ARE NOT HELD BOUND BY HIS ACTS.

	Case No.		Case No.
Roe v. *B. L. & C. J.* (1851) ...	502	*Allen* v. *L. & S. W.* (1870) ...	505
Lumsden v. *L. & S. W.* (1867)...	503	*Edwards* v. *L. & S. W.* (1870) ...	506
Poulton v. *L. & S. W.* (1867) ...	504		

DIGEST.

In *Roe* v. *Birkenhead Lancashire and Cheshire Junction* (1851) Chief Baron Pollock—"The principle applicable to master and servant is that the master is not liable for the *tortious* act of the servant, unless he has either given him express directions or an implied authority to do the act. There might be some evidence

of Phillips being the servant of the Company, but there is no evidence of authority given him to arrest the Plaintiff, and probably the whole was a blunder on his part, and altogether unsanctioned by the Company."

In *Poulton* v. *London and South Western* (1867) a station-master arrested a groom with a horse for half an hour. Justice Blackburn said—"We do not think it is within the scope of his authority in what he was authorised to do so to bind the Company. It was an act out of the scope of his authority, and for which the Company would be no more responsible than if he (station-master) had committed an assault or done any other act which the Company never authorised him to do."

In *Lumsden* v. *London and South Western* (1867) Plaintiff was waiting for a train at Clapham Junction, and had a friendly sparring match with the railway policeman. The policeman got the worst of it, lost his temper, and gave Plaintiff into custody for obstructing him in his duty and assaulting him. The Magistrates dismissed the assault case, and Baron Bramwell held the Company were not liable for the act of their policeman as to the arrest.

In *Edwards* v. *London and North Western* (1870) Holmes, a foreman porter, saw Plaintiff, a Company's policeman, removing boards from the Canada Dock Station, and, thinking he was stealing them, gave Plaintiff into custody. The Magistrates discharged the Plaintiff, and shortly after the Company dismissed him. On the first trial the Jury gave Plaintiff £100 damages for false arrest. On the appeal Justice Keating gave Judgment for Company, as Holmes was not acting within the scope of his authority.

In *Allen* v. *London and South Western* (1870) a booking clerk gave Plaintiff in change a two sous coin for a penny. Plaintiff refused it, and the clerk declined to change it, so Plaintiff reached over the counter and attempted to put his hand into the bowl of the till containing copper coins. He was given in charge and locked up in a police station all night. The Magis-

trates dismissed the case. On the final appeal Justice Blackburn held—"It is quite clear that there was no evidence of an express authority by the Company to arrest Plaintiff." Judgment for Company.

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502. *Roe* v. *Birkenhead Lancashire and Cheshire Junction Railway Company.*—Action for arrest and false imprisonment. Plaintiff went to the Monks Ferry Station, Birkenhead, and took an excursion ticket thence to Bangor and back. He asked the clerk at what time the return train left Bangor, and was wrongly told at 7.30 p.m. He accordingly took the 7.30 p.m. train at Bangor, and on arrival at Chester his ticket was taken and 2s. 6d. excess demanded. He refused to pay, and a superintendent at the Chester Station directed one of the railway servants, named Phillips, to take him into custody, which was accordingly done by Phillips and the superintendent. Plaintiff then paid the 2s. 6d. under protest, and brought an action. The first trial was before Justice Maule, at the Chester Spring Assizes, 1851, when the Jury gave a verdict against the Company for £50. Leave was given to appeal, and Chief Baron Pollock gave the following Judgment:—"This rule must be absolute to enter a non-suit. There was no evidence to show that the Company were liable. I regret that the Company should be able to escape the payment of the £50 damages, but we are bound to administer the law as it existed before the time of railways, and we must apply to this case the principles applicable to principal and agent and master and servant. The principle is that the master is not liable for the *tortious* act of the servant, unless he has either given him express directions or an implied authority to do the act. If the act had been one the Company were legally authorised to do, it might have been put as having been done with the authority of the Company. But the evidence was of an injury having been done, and done wrongfully, and therefore, treating Phillips as the servant, the Company are not liable for his *tortious* act any more than other individuals would be. Perhaps there might be some evidence of Phillips being the servant of the Defendants, but there is no evidence of authority given to him to arrest the

Plaintiff, and probably the whole was a blunder on his part, and was altogether unsanctioned by the Company." Barons Parke and Alderson concurred.—*Tried in Court of Exchequer, November* 15, 1851.—*From Law Journal Reports, vol.* 21, *page* 9.

503. *Lumsden* v. *London and South Western Railway Company.*—Action for damages for false imprisonment. Plaintiff and some friends went to the Clapham Junction Station to catch the 12.44 a.m. train. They had to wait, and commenced to skylark with White, the Company's policeman in uniform. Plaintiff and White had a friendly sparring match. White's helmet fell off, and one of the party stopped it with his foot. White got indignant, sent for a policeman, and gave the party in charge for obstructing and assaulting him in the discharge of his duty. They were locked up for the night, but the case was next morning dismissed by the Magistrates.

Baron Bramwell said there was no case whatever against the Company. "The Plaintiff, with others, quarrel with a man in the employment of the Company, who, without the slightest authority, gives him into the custody of a policeman. The Company cannot be liable for such an act on the part of one of their servants." Judgment for Company.—*Tried in Court of Exchequer, June* 19, 1867.—*Law Times Reports, vol.* 16, *page* 609.

504. *Poulton* v. *London and South Western Railway Company.*—Action for false imprisonment for half an hour at Romsey Railway Station. The Plaintiff was in charge of a horse which had been exhibited at the Salisbury Agricultural Show. There was an arrangement that horses sent to the show could be sent back "on return free, if remaining unsold, on production of a certificate to that effect." The horse was loaded in a van at Salisbury, and no payment or booking took place. The station-master at Romsey demanded 6s. 10d. for the carriage of the horse, which Plaintiff refused to pay; and two policemen detained Plaintiff at Romsey Railway Station for half an hour until, by telegraph, it was ascertained from Salisbury it was "all right." The case was first tried at the Hants Spring

Assizes, before Chief Baron Kelly, when the Jury gave Plaintiff a verdict for £10. The Company appealed, and on the appeal case Justice Blackburn said—"The question we have to determine is—Can there be said to be any evidence from which it may be inferred that the Company authorised the station-master to do an act which it appears he would be utterly unauthorised to do? We think not. We do not think it is within the scope of his authority in what he was authorised to do so to bind the Company. It was an act out of the scope of his authority, and for which the Company would be no more responsible than if he had committed an assault or done any other act which the Company never authorised him to do. An act was done on the part of the station-master which could never be right on the part of the Company to do. Having no power themselves, they cannot give the station-master any power to do the act. Therefore the wrongful imprisonment is an act for which the Plaintiff, if he has a remedy at all, has it against the station-master personally, but not against the Company. The Act enacts in very careful words that where a passenger does not pay his fare he may be taken into custody (8 Vic., cap. 20, secs. 103 & 104). To arrest and take into custody any person who does not pay his fare would be an act which the Company was authorised to do; and it might be said that the station-master, being the head man on the spot, had authority to take into custody those who did not pay their fares, and if he made a mistake it was a mistake in doing a thing which the Company had given him authority to do, and then the Company would be responsible." Justices Mellor and Shee concurred. Judgment for Company.—*Tried in Court of Queen's Bench, June* 29, 1867.—*Law Reports, Queen's Bench, vol.* 2, *page* 534.

505. *Allen* v. *London and South Western Railway Company.*—Action for £100 for false imprisonment. Plaintiff, at the Twickenham Station, asked for a second class ticket to Waterloo. It was given him, and he put down a florin. In the change the booking clerk gave him a French two sous coin for a penny. Plaintiff refused the French coin, and demanded a penny. The clerk refused to give him one. Plaintiff then

reached over the counter and attempted to put his hand into the bowl of the till containing copper coin. The clerk seized Plaintiff, gave him in charge of the Company's policeman, and he was then given into charge of a Metropolitan policeman, and was locked up at the police station all night. The Magistrates next day dismissed the charge. The case was first tried at the Middlesex Sittings, Hilary Term, 1870, before Justice Blackburn, when the Jury gave Plaintiff a verdict for £100. The Company appealed, and on the appeal case Justice Blackburn delivered Judgment—"There can be no doubt that the Plaintiff has been very ill used, as he was most improperly arrested, but, unfortunately, he has sued the wrong person, and therefore the Judgment must be for the Company. It is quite clear that there was no evidence of an express authority by the Company to arrest the Plaintiff. Then can such authority be implied? The booking clerk has an implied authority to do all acts which are necessary for the protection of the money entrusted to him. I am inclined to think if a man in charge of the till were to find a person attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the clerk might have an implied authority to arrest the offender; or if the clerk had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, such might be within the authority of the person in charge of the till. I am not prepared to pronounce a decided opinion on these supposed cases. The present case is altogether different. There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony, or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. If the law were that the Company are responsible for the act of their clerk in giving the Plaintiff into custody on an unfounded charge, every shopkeeper in London would be answerable for any act done by a shopman who chose to accuse a person of having attempted

to plunder the shop. Where a company have, under a bye-law, a power to arrest a man if he does not pay his fare, the primary object of the bye-law is to enforce the payment of fares to the company, and to protect their interest; and it has been rightly held that, when a company leave a servant in charge of a station, he has an implied authority to decide that the bye-law shall or shall not be enforced. But if the servant in charge of a station does an act in no way connected with the business of the company, there would be no implied authority, and the company would not be liable, as was decided in *Poulton* v. *London and South Western*, also *Edwards* v. *London and North Western*. There was no authority for the arrest when it could only be for the purpose of vindicating public justice, and not for the purpose of protecting the property of the Company." Verdict for Company. Justices Mellor, Lush, and Hannen concurred.—*Tried in Court of Queen's Bench, Nov.* 22, 1870. —*From Law Reports, Queen's Bench, vol.* 6, *page* 65; *also reported in Law Journal Reports, vol.* 40, *page* 55.

506. *Edwards* v. *London and North Western Railway Company.*—Action for damages for false imprisonment. Plaintiff was a policeman in the Company's employ at the Canada Dock Station, Liverpool, and one evening (1st May, 1869) was removing some boards in a railway truck from the yard. Richard Holmes, the Company's foreman porter—then in charge of the yard, the manager (Mr. Scaife) having left—gave Plaintiff into custody for stealing the boards. Plaintiff was brought before the Magistrates, and Holmes attended to prosecute; but the Magistrates, hearing how Plaintiff had acquired the right to the boards, discharged him. The Company a few days after discharged Plaintiff from their service. The case was first tried before Justice Hayes, at Liverpool, and the Jury found that the Company had affirmed the act of Holmes, and gave Plaintiff £100. Leave to appeal was given, if the Court should be of opinion that Holmes had no authority to give the Plaintiff into custody, or that there was no evidence of a ratification by the Company of the act done by Holmes.

On the appeal case Justice Keating said—"This was an action in consequence of one of the Company's servants, named

Holmes, having given the Plaintiff into custody on a charge of felony. It appears Holmes, although not the superior servant at the Company's timber yard, was for the time being, by reason of the absence of the superior, the servant highest in station there, and, being under the impression the Plaintiff was stealing the property of the Company, he gave Plaintiff into custody. It is clear that there was no evidence of any express authority to give Plaintiff into custody; and if there be any evidence to fix the Company in this action, it must be that such authority must be implied from the position occupied by Holmes as their servant, and that raises the question of whether a servant in the position of Holmes in this case has an implied authority to give anyone into custody. I am of opinion that he has no such implied authority. It seems to be agreed on both sides that there is no such case in which, under similar circumstances, such authority has been held to exist. There have been cases in which companies have been held liable for arrests made by their servants in pursuance of bye-laws, where the statute enabling the bye-laws to be passed has *authorised persons to be apprehended* who have broken them. In those cases it has been held that the servants placed by the Company to enforce their bye-laws have an authority to arrest, as such is to be implied from the authority to enforce the bye-laws. That is the farthest extent to which the liability has been carried, and it would be carrying it much farther than has ever yet been done if we were to hold the Company responsible for the arrest of the Plaintiff in the present case. Holmes acted in performance of a general duty to vindicate what he supposed had been an infraction of the law; but that is not that sort of duty which would connect what he did with the Company. For that it must be shown that it was his duty to the Company to give persons into custody under such circumstances as occurred here, but I cannot find any evidence that would lead to any such implication. Plaintiff contended there was evidence of a ratification by the Company, but the Court intimated that there was no such evidence. To constitute a ratification there must be a knowledge of the act that has been done, and an intention to ratify it; but the proof as to this failed on both points. I am unable to see any evidence on which a Jury would be justified

In finding the Company liable in this action." Justice Montague Smith said—"I by no means, however, intend to say that in the case of a company which can act only by its representatives there might not be officers who, by reason of the nature of their appointment and other circumstances, might be presumed to have authority from the company to apprehend, as, for instance, where the company have had servants appointed as night or police constables to watch and protect their property. It is not necessary to decide, nor do I wish to decide, that point." He concurred with his learned brother's Judgment. Justice Brett also concurred, and said that in the case of *Poulton* v. *London and South Western* Justice Blackburn pointed out that the arrest must be done by the servant, not only for the benefit of his master, but *in the course of his employment* (*i.e.*, one of the objects of his duty). Judgment for Company.—*Tried in Court of Queen's Bench, May* 4 *and* 7, 1870.—*From Law Journal Reports, vol.* 39, *page* 241.

PERSONAL INJURY.

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Compensation for Accidents.—31 & 32 *Vic., cap.* 119, *sec.* 26.—"Whenever any person injured by an accident on a railway claims compensation on account of the injury, any Judge of the Court in which proceedings to recover such compensation are taken, or any person who, by the consent of the parties or otherwise, has power to fix the amount of compensation, may order that the person injured be examined by some duly qualified medical practitioner named in the order and not being a witness on either side, and may make such order with respect to the costs of such examination as he may think fit."

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507. *Tooney* v. *London Brighton and South Coast Railway.*—Action for £35 for personal injury. Plaintiff went to New Cross Station at night to take the train. He asked a stranger on the platform the way to the urinary, and a part of the platform was pointed out where there were two doors. On one there was an inscription "For Gentlemen," and there was a lamp over the door. On the other door the inscription was "Lamp Room," and there was no light over that door. Plaintiff, who could not read and was in a hurry, entered the latter door, which opened with a spring, and falling down some stairs which were inside, hurt his head. The case was tried at the Middlesex Sittings, Trinity Term, 1857, and Justice Cresswell directed a non-suit, with leave to move for a new trial. On the new trial for a rule, Justice Williams said the Plaintiff was directed by a stranger, and there was no evidence that the steps were dangerous. If it had been shown that they were dangerous, that might have made a difference. Justice Willes said, in order to make out a case of negligence, it ought to have been shown that the steps were more than ordinary dangerous. It was impossible for anyone so to dispose his property that a man might not by accident or negligence injure himself upon it. Judgment for Company.—*Tried in Court of Common Pleas, November* 17, 1857.—*Law Journal Reports, vol.* 27, *page* 39.

508. *Waite* v. *North Eastern Railway Company.*—Action for personal injury at Velvet Hall Station. Mrs. Park and a child aged five were going across the line at the level crossing from one platform to the other, when a passing goods train knocked down Mrs. Park, who was killed, and the child was severely injured. For that injury the present action was brought. A half ticket had been taken for the child. The action was raised by Alexander Waite, the child's nearest friend.

Held by the Court of Exchequer Chamber, affirming the Judgment of the Court of Queen's Bench—That the child could not maintain an action against the Company. On the first trial the Jury found the Defendants were guilty of negligence, and that Mrs. Park was also guilty of negligence which contributed to the accident, and they assessed the damages at £20. This Judgment was reversed by Chief Justice Lord Campbell. Judgment for Company.—*Tried in the Court of Exchequer Chamber, June* 10, 1858.—*From Ellis, Blackburn, and Ellis's Reports, vol. 5, page* 719.

509. *Burke* v. *Manchester Sheffield and Lincolnshire Railway Company.*—Action for personal injury at New Holland. The Plaintiff was a passenger to Hull, and the train in which he travelled was taken forward at New Holland from the station to the landing stage. While the train was being so moved a concussion took place, and the Plaintiff was thrown forward and injured. It appeared the train came in contact with the permanent buffers at the end of the landing stage.

Chief Justice Bovill said—"There is no doubt that in some cases the mere occurrence of an accident is not evidence of negligence against the railway company, but each case must depend upon its own merits. In the case of *Scott* v. *London Dock Company* (3 Hurlstone and Coltman's Reports, page 596) the rule is very clearly drawn 'that there seems to be reasonable evidence of negligence, and that where the thing is solely under the management of the Defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management of the machinery use proper care, it affords reasonable evidence, in the absence of

explanation by the Defendants, that the accident arose from want of care.' Now there was evidence that the Company failed to stop the train soon enough, and so let it bump against the buffers, and caused the accident in this way. There is evidence of negligence when it was proved that the train ought to have stopped without a rebound." Thus, on the appeal case, the verdict of the Jury was affirmed against the Company.—*Tried in the Court of Common Pleas, April* 20, 1870.—*From Weekly Reporter, vol.* 18, *page* 694.

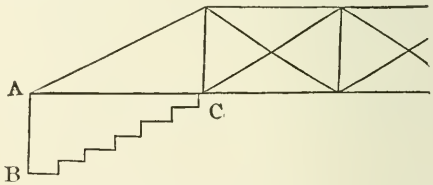
510. *Cornman* v. *Eastern Counties Railway Company.*—Action for personal injury, Plaintiff breaking his knee-cap. He was a carrier's servant, and on Christmas Day went to the Bishopsgate Station to meet a train by which he expected a basket of poultry. There was a rush of between 200 to 300 people on to the platform. At the side of the platform there was a movable weighing machine where passengers' luggage was examined and weighed. The machine was six inches above the floor, and had stood there for five years. Plaintiff was pushed against it by the crowd, and fell and broke his knee-cap. The case was first tried at Guildhall, London, when Baron Channell left it to the Jury to say whether there was negligence on the part of the Company in leaving the machine in such a position. The Jury gave Plaintiff a verdict for £50. The Company appealed, and Baron Martin held there was no evidence of negligence to go to the Jury. Barons Bramwell, Watson, and Channell concurred. Judgment for Company.—*Tried in Court of Exchequer, June* 22, 1859.—*From Law Journal Reports, vol.* 29, *page* 94, *Ex.*

511. *Lowman* v. *Dublin Wicklow and Wexford Railway.*—Elizabeth Lowman, a third class passenger, killed at Bootersstown. She omitted to get out when train stopped, and jumped out when it started, and died from injuries sustained. Plaintiff's pleas—(1) Insufficient notices to indicate name of station; (2) proper means not taken to intimate arrival at station; (3) train did not stop a reasonable time; (4) not a proper staff of able and intelligent porters. Three passengers in same carriage with deceased rebutted these pleas. The Chief Justice directed the Jury, if her death was caused immediately by her

own act and neglect on her part, although there might also *have been negligence* on the part of the Company, the law required that they should give a verdict for Company. Verdict given for Company.—*Tried before Chief Justice Monaghan and a Special Jury, Dublin, 9th and 10th February*, 1860.—*From Irish Clearing House Reports.*

(*N.B.*—Agents should judge whether Plaintiff's pleas could be sustained against their stations in case of accident. In such cases take the names of all passengers in same compartment.)

512. *Longmore* v. *Great Western Railway.*—Action by a widow for death of her husband, who one night, at one of the Company's stations, fell through an opening in side of a footbridge crossing the line.



From A to B was about 4 feet, and A to C between 7 and 8 feet. The deceased fell through the aperture A B C and was killed. The Jury found a verdict for Plaintiff, on the ground that the bridge was not a safe or proper one. The Company appealed, when Chief Justice Erle said—"I am of opinion that there was evidence to go to the Jury, and that the Judge (Justice Keating) would not have been justified in taking the matter out of the hands of the Jury, in whose province it was." Justice Byles—"I am of the same opinion. The defect was not obvious, and the danger not apparent; it was the nearest way, and the deceased was invited to use it; and it was a question for the Jury whether it was an improper structure." Justice Keating—"I am of the same opinion. The Jury might have found no negligence, and I do not say that I should have found the same way as they have done. It was, however, a question for them." Justice Willes concurred. Judgment against Company. —*Tried in Court of Common Pleas, May* 31, 1865.—*Law Journal Reports, vol.* 35, *page* 135.

513. *Nicholson* v. *Lancashire and Yorkshire Railway Company*—Action for £200 for personal injury. Plaintiff, on

the night of November 12, 1863, alighted from the Wakefield train at the Thornhill Lees Station, on the south platform. It was necessary, to make his exit from the station, to cross the line at the end of the south platform, where there was a level crossing. The train, being a long one, fouled the crossing. Plaintiff at the end of the platform gave up his ticket to the collector, who said "Pass on." Plaintiff, in passing on along the line in the dark, fell over a hamper taken out of the van, and sustained personal injury. There was no lamp where he fell. The case was first tried at the West Riding Summer Assizes, before Justice Blackburn, when the Jury gave a verdict for £200. The Company had leave to move to enter a non-suit if the Court should think there was no evidence of negligence. On the appeal case Chief Baron Pollock delivered Judgment, and said— "It appears the train remained as long as ten minutes or a quarter of an hour at the station. This had happened before, and the passengers had acquired the habit of passing along the line so as to reach the opposite platform by going round the end of the train and then crossing. The collector told the passengers to 'go on,' and certainly there was no other way of going on except going alongside and round the end of the train. Under these circumstances there was some evidence of negligence to go to the Jury. There was no light; there was a hamper put down which the Plaintiff stumbled over, and he received considerable damage. It appears to us sufficient to say that if on the arrival of a train there is an obstacle to the passengers getting to the place of exit from the station, which obstacle remains there for ten minutes or a quarter of an hour, there is some evidence of negligence. Certainly a passenger should be able to get away in much less time than a quarter of an hour after the arrival of the train. The Company would be responsible for any mischief that arose in this case, unless the Jury thought that the accident was entirely attributable to the negligence of the Plaintiff." Verdict against Company.—*Tried in Court of Exchequer, January* 31, 1865.—*From Law Journal Reports, vol.* 31, *page* 84.

514. *Smith* v. *Great Eastern Railway Company.*—Action for damages arising from a strange dog at one of the Company's

stations tearing the dress and biting Plaintiff (a woman). On the evening in question a woman passenger was attacked by a strange dog on the platform. Complaint was made to the Company's servants, and the dog's removal promised, and it disappeared. About an hour and a half afterwards the signalman found the same dog worrying a cat in the signal box, near the platform, and kicked him out, whereupon the dog rushed away to the platform, where people were getting in and out of a train, and bit the Plaintiff, who was a passenger, and who brought an action against the Company for negligence. Held —That there was no evidence to render the Railway Company liable.—*Tried in Court of Common Pleas, Nov.* 21 *and* 22, 1866.—*From Law Journal Reports, vol.* 36, *page* 22.

515. *Crafter* v. *Metropolitan Railway Company.*—Action for personal injury arising from Plaintiff, in ascending a staircase at one of the Company's stations, slipping down. It was a wooden staircase, six feet wide, with a wall on both sides, but no hand-rail; the steps were tipped at their edges with brass, $2\frac{1}{2}$ in. wide, which by wear, it was alleged, had become slippery. On the first trial a verdict was found for Plaintiff, with leave to the Company to move to enter a non-suit on the ground that there was no evidence of negligence to go to the Jury. On the appeal case Chief Justice Erle said—"I am of opinion the Judgment of the Court should be for the Company, and I think there was no evidence to go to the Jury of actionable negligence. In my judgment, according to common experience, the staircase was an ordinary structure; there was nothing of a peculiar nature about it, nothing like a trap-door, or a way of falling through the railing. There was a wall on both sides, and the passenger had only to lift his foot from step to step. The brass, having become smooth, was said to be slippery at times, and there was evidence that lead (tipping) would be less slippery than brass. The Company, in my opinion, are not liable because certain witnesses come and say they think that lead would have been safer than brass. Considering the nature of the structure, a passenger had no right to claim that there should be an hand-rail, which in truth could only be used by those passengers who went up nearest to the wall. It was not a thing that ordinary

people would demand, and there is no law that requires a railway company to gratify such a demand." Justice Willes, Justice Keating, and Justice Montague Smith concurred. Judgment for Company.—*Tried in Court of Common Pleas, Jan.* 27, 1866.—*Law Journal Reports, vol.* 35, *page* 133.

516. *Welfare* v. *London Brighton and South Coast Railway Company.*—Action for personal injury. Plaintiff went to the London Bridge Station to go to Croydon. He missed his train, and then asked a porter when the next train started. The porter directed him to a time-bill hanging outside the door of the booking-office, under a portico or covering. While Plaintiff stood looking at the time-table he was struck by something at the back of the neck. He found that a plank and roll of zinc had fallen through the covering, and one or the other had struck him. Upon looking up he saw the legs of a man protruding through the covering. The case was first tried at the Middlesex Sittings, 1868, when Judge Blackburn directed a non-suit, on the ground that there was no evidence to prove that there was any negligence on the part of the Company. Plaintiff appealed, and on the appeal case Chief Justice Cockburn affirmed the Judgment in favour of the Company. He said—"In order to make out negligence so as to make the Company liable in respect of the injury, the Plaintiff must show either that the Company knew or had the means of knowing that the covering was in an insecure state, or that the person who was upon it was employed by them. If the man on the roof had been employed by some builder or other tradesman to do work upon the roof, he would not be the servant of the Company, and they would not be liable in this action."

Justice Blackburn—"The Company were bound, no doubt, to take reasonable care that the covering was in a fit state, so that those whom they invite to come upon their premises should not suffer injury by reason of its defective state; but here there is nothing to show that they did not take such reasonable care; something more than the mere occurrence of the accident is wanted to make them liable in this action." Judgment for Company.—*Tried in Court of Queen's Bench, June* 3, 1869.—*From Law Journal Reports, vol.* 38, *page* 241.

517. *Leishman* v. *London Brighton and South Coast Railway Company.*—Action for £50 for personal injury. Plaintiff, a passenger, fell on a flight of stone steps at Forest Hill Station, and broke some of his ribs. The width of the staircase was 4 ft. 7 in., the tread of the steps 11½ in., and the rise from one step to another 7 in., with a hand-rail each side. The constant wear and tear of 60,000 persons a month led to the steps being worn to the extent of 1½ in., not in one place, but uniformly the full length of the steps. The case was first tried at the Middlesex Sittings, before Baron Pigott. Plaintiff admitted he did not use the hand-rail. Two or three persons had previously fallen on the steps. The Jury held there was negligence on the part of the Company, and gave Plaintiff a verdict of £50. The Company appealed, when Chief Baron Kelly said—"The whole question here was left to the Jury, involving both the amount of negligence, if any, on the part of the Company, and the amount of want of care, if any, on the part of the Plaintiff, and, having the whole matter before them, they arrived at the conclusion that there was negligence on the part of the Company, for which they were liable. The state of the staircase is a question of degree, and one entirely and emphatically for the Jury, and it is not one upon which a Judge should be called upon to pronounce a decision. The width of stairs allowed more than two people to be on the steps abreast, and, with a crowd, a person could not take hold of the hand-rail. We cannot disturb the verdict." Barons Cleasby and Pigott concurred. Judgment against Company.—*Tried in Court of Exchequer, Nov.* 9 *and* 11, 1870.—*From Law Times Reports, vol.* 23, *page* 712.

518. *Tebbutt* v. *Bristol and Exeter Railway Company.*—Action for personal injury, resulting from a portmanteau falling off a heavily loaded truck on to Plaintiff's leg while being wheeled along the Bristol platform. Plaintiff had been a passenger by Midland Railway from Gloucester to Bristol, and was going on to Bath by Great Western Railway. The Midland, Great Western, and Bristol and Exeter Companies' stations at Bristol are together, and, in a sense, common to mutual passengers. Plaintiff, at the time of the accident, was standing on the

Defendants' platform (Bristol and Exeter Company), and the porter of *that* Company was driving a truck quickly round a corner, which led to the falling of the portmanteau. Plaintiff was on his way to the platform where he would get his Great Western train for Bath. On the first trial the Jury gave Plaintiff a verdict for £300. Leave was given the Company to appeal to enter a non-suit if there was no evidence of the liability of the Company, which ought to have been left to the Jury. On the appeal case Justice Lush gave Judgment against Company, saying—"Plaintiff was allowed the use of the Company's platform in the same manner and upon the same conditions as if he had been one of their passengers, and is as 'external' to the Company and their servants as he would have been if the accident had happened to him in the public street."—*Tried in Court of Queen's Bench, November* 14 *and December* 10, 1870.—*From Law Journal Reports, vol.* 40, *page* 78.

519. *Long* v. *City Dublin Steam Packet Company.*—Action for £300 for personal injuries through Plaintiff falling over a hawser on passage, Kingstown to Holyhead. The hawser, which, through insufficiency of light, Plaintiff did not see, was laid across the deck aft of the after hurricane deck of the "Ulster," ready to moor vessel at Holyhead. The captain and several of the crew proved the hawsers were laid in the usual manner, that there was sufficient light to observe them, and no complaint of any accident was reported at the time. The Jury found the Plaintiff was entirely to blame, and the Judge directed a verdict for Company.—*Tried at Dublin, before Chief Baron Pigott and Special Jury,* 17*th June,* 1871.—*From Irish Clearing House Reports.*

520. *Thompson* v. *Belfast Holywood and Bangor Railway Company.*—Action for personal injury. The female Plaintiff travelled from Holywood to Belfast in an excursion train. Being a long train, on arrival at Belfast platform several carriages extended some distance beyond the platform. Plaintiff waited some time and looked out for assistance, and was seen by the station-master, who was then helping passengers out of the other carriages, but gave her no caution, whereupon she alighted, and in doing so received the injuries complained

of. On the first trial the Company contended there was no evidence of negligence to go to the Jury. The case, however, was submitted to the Jury, who found £25 damages against the Company. On the appeal case Baron Fitzgerald said—"We think there was evidence of an invitation to alight given to the Plaintiff in the fact that the train had arrived at the end of its journey, and the fact that the officers of the Company were letting the passengers out of the carriages at the terminus. There was also evidence that the station-master saw her about to alight from the carriage and yet did not warn her against doing so, though the place of descent was dangerous. This evidence of negligence may have been slight, but we cannot hold that the Judge was bound to withdraw it from the Jury." Judgment against the Company.—*Tried in the Court of Exchequer (Ireland), November* 14, 1871.—*From Irish Reports, Common Law, vol.* 5, *page* 517.

521. *Falkner* v. *Great Southern and Western Railway Company.*—Action for death of a passenger, Dublin to Parsonstown. Passengers had to change at Roscrea Junction for Parsonstown, and Plaintiff arrived there at a quarter past seven on the 25th October, 1870. It was an intensely dark night. Deceased was crossing the main line in the direction of the station-master's office, and he was killed by a train going from Cork to Dublin. The deceased was quite sober, and it was proved that the train by which he was killed was sixteen minutes late at the time of the accident. There was no bridge for the accommodation of passengers at the junction to cross the line, although there is such a bridge at every other junction upon the railway. Justice Lawson ruled that there was no evidence of negligence to go to the Jury, and directed a verdict for the Company.

On the appeal case Chief Justice Whiteside said—"We are of opinion the direction of the learned Judge was right. Before a Plaintiff could succeed in such a case as this, he must prove positive negligence on the part of the Company. I do not think that there was any evidence of such negligence, and the rule sought for must be refused."—*Tried in the Court of Queen's Bench, April* 19, 1871.—*From Irish Reports, Common Law, vol.* 5, *page* 213.

522. *Shepherd* v. *Midland Railway Company.*—Action for £150 for personal injury and dislocated shoulder, arising from a fall on Ampthill Station platform through ice being allowed to remain on the platform. Plaintiff was an attorney at Luton, and on 29th December, 1870, while waiting for his train, was smoking a cigar and walking along the platform, when his legs suddenly went from under him and he fell heavily. The weather was exceedingly cold and frosty. The case was first tried at the Bedfordshire Assizes, when the Jury gave a verdict for £150. Leave was given to appeal to enter a non-suit if the Court was of opinion that there was no proof of negligence. On the appeal case Baron Pigott said—"If there had been only a very small piece of ice, in a place where the railway servants had no opportunity of seeing it, there may have been no negligence; but where we have a layer of ice three quarters of an inch thick and extending half across the platform, and that, too, at three o'clock in the afternoon, there was plenty of opportunity for them to have seen it and to have removed it. The question has been raised that if the servants could have seen it so also could the Plaintiff. That was a question for the Jury. I am of opinion there was evidence to go to the Jury of negligence of the Company." Judgment against Company. Baron Martin concurred.—*Tried in Court of Exchequer, January* 23, 1872.—*From Law Times Reports, vol.* 25, *page* 879.

523. *Nicholls* v. *Great Southern and Western Railway Company.*—Action for personal injury. The Plaintiff was a second class passenger from Cork to Dunkettle. She habitually travelled between these places every Sunday for four years. The train on this occasion overshot the platform, and the carriage in which the Plaintiff rode, being next to the engine, was beyond the platform. The station-master was absent at prayers, but a porter named Flynn, acting for him, called out the name of the station, "Dunkettle," two or three times. He also opened two or three carriage doors on the train to let people out, and then went to check tickets at the station exit door. The Plaintiff, with a fellow-passenger's assistance, proceeded to alight. This fellow-passenger, a Mr. Cameron, got out of the carriage, and warned her to be

cautious in getting down, that it was "a devil of a place." She proceeded very cautiously, getting down on the iron step, and when endeavouring, with Cameron's assistance, to get from the iron step to the wooden one beneath, she fell and met with the injury. The train was not put back, neither did she ask to have it put back, and there was obviously no intention to have it put back. On the first trial the Jury gave Plaintiff a verdict for £50 against the Company.

On the appeal case Justice Lawson said—"It is not to be forgotten, in these cases, that if a passenger takes a ticket to a particular station, there is not only a contract by the company to stop at that station and afford reasonable facilities for getting out, but there is an obligation on his part to alight there, if he can do so with reasonable safety, otherwise he would be violating the laws of the company in travelling to a place beyond that which his ticket entitled him to do. We are all agreed in thinking that the case was properly submitted to the Jury, and that the cause shown must be allowed." Judgment against the Company.—*Tried in the Court of Common Pleas (Ireland), January* 24 *and* 25, *and February* 10, 1873.—*From Irish Reports, Common Law, vol.* 7, *page* 40.

524. *Hogan* v. *South Eastern Railway Company.*—Action for personal injury. Plaintiff was an excursion passenger, with her two children, one in arms, on Whit Monday, London to Hastings and back. The platform at Hastings was enormously crowded, and owing to the rush of the crowd Plaintiff was pushed on to the line and injured. The first action was before Baron Martin, at the Sussex Summer Assizes, 1872, when the Judge intimated his opinion that the facts proved did not amount to negligence in the Company, and even if they did they also proved contributory negligence in the Plaintiff, and directed a non-suit. Plaintiff appealed for a new trial, and Judge Keating said—"I am of opinion that this case ought not to have been withdrawn from the Jury. The question arises whether the Company are bound to make regulations and adopt precautions adequate to the crowd which they have caused to assemble. I think that there is some necessity that they

should do so in each case. But each case has a different variety of circumstances surrounding it, and it is just this variety that a Jury can deal with and the Court cannot. Once establish that there is some duty cast upon them to regulate the crowd, and it is then for the Jury to say to what extent this is to be done under the circumstances of each case. I quite agree that it would be monstrous to expect the Company to guard against the pressure of an inconsiderate crowd, and that if the accident did arise from the natural impulse of the crowd, then the Company cannot be held liable. But it was for the Jury to judge of the character of the crowd." Justices Brett and Grove concurred. Judgment against Company.—*Tried in Court of Common Pleas, February* 8, 1873.—*From Law Times Reports, vol.* 28, *page* 271.

525. *Johnson* v. *Great Southern and Western Railway.*—Action for personal injury by a passenger alighting from a carriage which was not opposite the platform, whereby he fell down and dislocated his shoulder. The carriage was opposite a slope from the platform to the level of the railroad.

The Plaintiff travelled by a mixed train, and one of the conditions printed on the ticket was as follows:—

"*Conditions upon which this Ticket is issued.*—This ticket, permitting the holder to travel in a passenger carriage attached to a goods train, is issued on the express condition that the Company shall be relieved from all pecuniary or other responsibility to the holder for personal injury or other delays consequent upon or in any way arising by reason of such passenger carriage being attached to a goods train; and the use of this ticket by the holder shall be taken as evidence of an agreement with the Company to the above effect."

The ticket was issued from Mallow to Kanturk, third class. There was no light in the carriage which the Plaintiff occupied, and it was dark when he alighted. On reaching Kanturk the train stopped at the goods store for about eight or ten minutes to shunt some of the waggons. There was an incline from the goods store to the Kanturk Station, and, after the waggons had been shunted, the engine was detached and proceeded to the station. The rest of the train followed down the incline again, stopping on reaching the engine. A fellow-passenger with Plaintiff stated at this time some person on the platform called out "Kanturk." On the first trial the Plaintiff obtained a

verdict for £100 damages. On the appeal case Chief Baron Palles said—"In the present case, in which the conditions are upon the ticket itself, the case is in accord with that of *Steward* v. *London and North Western Railway.* We must therefore set aside the verdict. Assuming, however, the Plaintiff to be bound by the conditions, we cannot enter a verdict for the Defendants pursuant to the leave reserved, as it was for the Jury to determine whether the injuries complained of were caused by the accepted peril, and this question was not submitted to them." Rule for a new trial.—*Tried in the Court of Exchequer (Ireland), June* 9 *and* 10, 1874.—*From Irish Common Law Reports, vol.* 9, *page* 108.

526. *Leggott* v. *Great Northern Railway.*—Action for personal injury received, owing to the deceased having been knocked down and seriously injured in the head and leg, while on the platform at King's Cross, by a barrow or trolly loaded with newspapers being negligently and violently pushed against him. Deceased was a season ticket-holder, and was waiting at King's Cross to take a train for Finchley. The Plaintiff, widow of the said passenger, now sued the Company for £1,000 damages for injury to personal estate and effects of R. T. Leggott, her husband, who subsequently died after the accident. A previous action had been instituted by the widow, when a verdict was taken by consent, and afterwards a Judgment was signed against the Company for the cause of action for £500 damages and costs, which the Company paid.

Held, on demurrer—First, that the second action was not barred by the Judgment and satisfaction under the first, consequently that there was no estoppel of which either party could take advantage, as the Plaintiff sued in a different right in either action. The first action Plaintiff sued under Lord Campbell's Act, and on the second action for damage to personal estate. The report does not state whether any, or what sum was recovered on the second action. It was, however, established that a second action could be taken.—*Tried in the Court of Queen's Bench, May* 25, 1876.—*From Law Reports, Queen's Bench Division, vol.* 1, *page* 599.

527. *Wilby* v. *Midland Railway Company.*—Action for £50 for personal injury at Keighley Station. Plaintiff went to Keighley Station to catch the 11.25 p.m. train to Leeds. There is no shelter or waiting-room on the up platform, so passengers stop in the waiting-room on the down side until the train approaches. There is no cross-over bridge inside the station precincts. The platform sloped off to a place where there was a boarded pathway across the rails. On the particular night a porter, on the train approaching, called out "All the other side for Leeds way." Plaintiff at that moment sent his companion to the booking-office to get tickets, and waited his return. Thus a short time expired, and when Plaintiff wanted to cross a train had come up, and stood on the down line covering the crossing place. Plaintiff walked along the platform to the tail of the train, and stepped on to the permanent way to cross. In doing this he stepped into a hole dug between the rails on the up line, and was thrown with considerable force with his head on the furthest rail. The ballast had been removed. The case was first tried at Leeds Spring Assizes, 1876, before Baron Bramwell, when a verdict was found against the Company, damages £50. The Company appealed.

On the appeal case Chief Justice Cockburn said—"The question here is whether or not the Plaintiff was aware of the proper place for crossing, and it seems to me that he was, and instead of availing himself of the opportunity of crossing in safety, which was afforded him, he chose to neglect such opportunity, and so brought on himself this misfortune." Justices Mellor and Lush concurred. Judgment for Company for a new trial.—*Tried in Court of Queen's Bench, May* 27 *and* 28, 1876.—*Law Times Reports, vol.* 35, *page* 244.

528. *The Dublin Wicklow and Wexford Railway Company* v. *Slattery.*—Action by a widow for death of her husband at a level crossing at the Lansdowne Station, at about 11.40 p.m., May 9th, 1873, on the Dublin and Kingstown Railway. At the time deceased attempted to cross the line there was a train standing on the up line in such a position as to prevent a person on the line behind it from seeing anything approaching on the down line. Deceased came from behind the train on the up line, and on crossing on to the down

line was struck by a down express train and killed. Persons were in the habit of crossing at this spot with the acquiescence of the Company. It was proved that it was a rule of the Company that express trains should whistle at the station crossing, but the evidence as to whether the express whistled on this particular occasion was conflicting. Deceased was not a passenger, but was accompanying a friend to the station who was going to Dublin. The case was first tried at the Wicklow Summer Assizes, 1873, before a Special Jury, when Plaintiff obtained a verdict. The Company appealed on the ground of improper reception of evidence, and a new trial having been granted, the case was heard at the Wicklow Spring Assizes, 1874, when Plaintiff obtained a verdict for £1,205. The Company appealed to the Court of Common Pleas on the ground that there was no evidence of negligence to leave to the Jury, and that the deceased had been guilty of contributory negligence. The Court of Common Pleas confirmed the verdict.

The Company then appealed to the Exchequer Chamber, when the six Judges were equally divided in opinion, so that the decision stood affirmed. The Company then appealed to the House of Lords. The Lord Chancellor (Cairns), in giving Judgment, said—"The appeal to the Exchequer Chamber could not, according to practice, raise any question as to whether the verdict was against the evidence; it only raised the question whether the verdict should be entered for the Company. It is the question only—namely, whether the verdict should be entered for the Defendants—which comes before your Lordships by way of appeal. If the question whether the verdict was against the evidence was open, I should be of opinion that a verdict more directly against the evidence I have seldom seen; and I think the Jury were probably actuated by feelings of compassion for the Plaintiff. The second issue—Was deceased guilty of contributory negligence? If the deceased, in coming on the six-foot way, had to look up the line, he would have seen the express train; and his conduct must be viewed between two alternatives—either he looked up and saw the train advancing, and took on himself the responsibility of getting across before it came close, or he did not look up the line at all. I am not aware of any authority for the Judge taking the case out of the hands of the Jury on the first trial, and none

of the cases cited in the course of the argument could be looked upon as an authority for such a course. I cannot look upon the litigation as satisfactory. The Company will, I fear, have to pay a sum for which I cannot think they ought to have been made liable; and the Respondent and her children will recover money to which their legal right has not been established. But I cannot seek to prevent this by proposing to your Lordships on the only part of the case which was brought for your determination to do what would seriously encroach upon the legitimate province of a Jury. I must, therefore, advise your Lordships to dismiss the appeal; but, under the circumstances, I think the appeal should be dismissed without costs."

Lord Blackburn—"It is the duty and power of a Judge not to find the facts; it is confined to giving the proper direction in point of law. If there is some further inference of fact which may be drawn from the undisputed facts, it is still for the Jury to say whether they will draw the inference. It is for the Judge to say whether they can draw it. To justify a direction from the Judge to find a verdict, the onus must be one way, and no reasonable evidence to rebut it. Those who go personally, or bring property where they know that they or it may come into collision with the persons or property of others, have by law a duty cast upon them to use reasonable care and skill to avoid such collision. But there arises a further question. It may well be that both parties are guilty of a neglect of duty, and if either had used reasonable care and skill the collision would have been avoided. In such case, the maritime law, which is followed in the Admiralty Court, apportions the joint damages; but by the common law, which we have now to administer, the damage lies where it falls, and the Plaintiff, who is himself to blame, cannot recover, though the Defendant may be also to blame. It was laid down in *Ryder* v. *Womberell* that there is in every case a preliminary question, which is one of law, viz., whether there is any evidence on which a Jury could properly find the question for the party on whom the onus of proof lies. If there is not, the Judge ought to withdraw the question from the Jury, and direct a non-suit if the onus is on the Plaintiff, or a verdict for Plaintiff if the

onus is on the Defendant. So far, the onus in this case was, at the beginning of the trial, on the Defendants. Can there be a case in which an admitted fact so clearly shows a *primâ facie* want of reasonable care on the part of the Plaintiff, causing the accident, that the Judge ought to rule that, unless there was proof of something to excuse or justify it, the Jury ought to find for the Defendants? Justice Brett, in this House, in *Bridges* v. *North London Railway Company*, certainly shows that he thought that in a proper case the Judge could withdraw the case from the Jury. Eight out of the nine Judges in the Court below expressly say that, in their opinion, it might be done. I assume that in what I am about to say, that the finding of the Jury that there was not any whistling on the part of the express train is binding, though, I think, very much against the evidence. I had and still have some doubts whether, as it appears on the evidence that the train had its lamps lighted, and was, in fact, seen at quite a sufficient distance, the Judge was not bound to say that the Defendants had fulfilled the duties cast upon them by law, and done enough without whistling, and that if they had done enough they were not liable because they might have done more."

Lord O'Hagan said—"The questions raised at the trial were questions of facts only—first, whether the Defendants had been guilty of negligence; secondly, whether contributory negligence could properly be ascribed to the man who lost his life. As questions of facts, they were proper to be submitted to the Jury, and the learned Judge who tried the case was bound, in my opinion, so to submit them. We have nothing to do with the weight of evidence, or the propriety of the inferences drawn by the Jury. I do not enter on the question how far the whistling was a precaution which the Defendants were bound to provide for the safety of the public. It seems to me that their own conduct is on the point conclusive against them. In the particular case they admitted the propriety of whistling, and accepted the duty of doing so. I do not acknowledge the force of the reasoning which would convert an issue in fact into an issue in law, merely because there seems to be a complete preponderance of evidence upon the one side, or because there is no evidence on the other. I am of opinion the appeal should be dismissed without costs."

Lord Selborne said—"If I had to decide the case on the weight of evidence, I should certainly give credit to the witnesses, who say that the usual notice by whistling of the approach of the down express was properly given, although the companions of the deceased may not have heard it. If the deceased had been a mere trespasser on the line, it would have been entirely his own fault that he was in the way of danger, and as the Company would have been under no special obligation to give warning of the approach of other trains to persons whose presence on the line they had no just cause to anticipate, the omission of whistling under those circumstances would not have been negligence on the part of the Company. I assent to the appeal being dismissed without costs."

Lord Coleridge said—"The true effect of the unanswered and unquestioned evidence as to the conduct of the deceased is given by Justice Keogh, in the Court below, with a force and accuracy to which I can add nothing, and it seems to me beyond controversy that deceased was not only negligent but reckless; to show that he was where he was without any business, any legitimate object, or any precautions, and to disprove that the Company caused his death by proving clearly that he caused it and brought it on himself. This is not, I think, fairly to be described as inference from the evidence, and so for the Jury; it is the very evidence itself unanswered and unquestioned. I think, therefore, that this case should have been withdrawn from the Jury. I must advise your Lordships that the Judgment of the Exchequer Chamber should be reversed."

The majority of the Lords being in favour of dismissing the appeal without costs, the verdict was against the Company.—*Tried in the House of Lords, February* 5, 7, 8, *and* 11, *May* 28 *and* 31, *June* 3, *and July* 31, 1878.—*Irish Reports*, 8 *Common Law*, 531, 10 *Common Law*, 256; *Law Reports, Appeal Cases, vol.* 3, *page* 1155.

This case forcibly illustrates how a sympathetic Jury may frustrate the ends of justice, and unfairly punish a railway company.

529. *Cannon* v. *Midland Great Western Railway Company.*—Action for personal injury. The action was under Lord Campbell's Act, to recover damages for death through alleged

negligence of the Company. It appeared that on the occasion of the casualty the deceased had taken a ticket for a special train at a cheap rate for harvestmen. He was unable to find accommodation in the special train, but remained on the platform until the arrival of the next ordinary train, together with a crowd composed of harvestmen who had also taken tickets for the special train, and of other persons, a large number of whom had entered the station without permission. The Company had an extra number of porters at the station, but in consequence of great disorderliness of the persons so assembled on the platform, and by a sudden and violent rush of the crowd, the deceased was pushed on the line, and was killed by the engine of the ordinary train as it approached.

At the trial the Jury found that the deceased was not entitled to proceed by the ordinary train; that the accident was occasioned by the rush of the crowd; that the Company had not taken due and reasonable precautions to prevent injuries from overcrowding on the platform, and that by using due and reasonable precautions they might have prevented the rush of the crowd.

On the appeal case it was held that, even assuming the deceased to have been lawfully on the platform, the Company were not liable for the accident which occasioned his death. A railway company is not bound to provide at a railway station, even when an unusually large number of passengers by a special and cheap train is expected, a staff of servants sufficient not merely for the guidance and assistance of passengers and the preservation of order amongst them, but adequate to control the violence of an assemblage of persons entering the station without permission and overcrowding the platform. Judgment for Company.—*Tried in the Court of Appeal, November*, 1879, *and January*, 1880.—*From Law Reports* (*Ireland*), *vol.* 6, *page* 199.

530. *Wright* v. *Great Northern Railway (Ireland).*—Action for personal injury to a passenger while crossing from one platform to another at Monaghan Road Station. Trains were in the habit of crossing twice a day at this station. The ticket office was situated at the down side of the line. The platform on the other side was not directly opposite, and was reached by an oblique level crossing. The space between the

double lines of railway at the crossing was about 18 feet, and there was a lamp midway in the space. The gate, which was usually left open, was at the end of the down platform. The Plaintiff, an intending passenger by an up train, sought to cross the line while a down train was standing at the platform. He passed through the gate, which was open. While running across he saw the up train, but had not heard any whistle, and, in endeavouring to jump on the platform, he was struck by this train and severely hurt. If he had remained in the spot at which he first saw the approaching train he would have escaped injury, as there was sufficient room for him to have stopped safely in the space between the two trains. The accident occurred on a dark and misty evening, and there was at the time much smoke and noise from the down train, which was standing in the station.

The Jury found a verdict for the Plaintiff, £80 damages, but stated, in the first instance, that both parties were to blame; and, in answer to the learned Judge, it appeared that their verdict was really based on the ill construction of the crossing.

In answer to specific questions they, however, found that there was no contributory negligence on the part of the Plaintiff (which had been pleaded), and that the Company had not been guilty of negligence, either in leaving the gate at the down platform open, or in not having a porter to warn persons against crossing at a dangerous time, or in the train not having whistled.

On the appeal case it was held that the verdict could not be sustained, because, *per* Chief Justice Morris and Justice Lawson, it was both unsatisfactory and against the weight of evidence on a plea of contributory negligence. Held further, *per* Justice Harrison—That there was no evidence of negligence on the part of the Company which could be legitimately connected with the accident; that the injury to the Plaintiff was solely caused by his own negligence, and that, therefore, the verdict in Judgment should be entered for the Company.—*Tried in the Court of Common Pleas Division, Feb.* 7 *and June* 2, 1881.—*From Law Reports (Ireland), vol.* 8, *page* 257

Personal Injury to Passengers Alighting from Carriages, etc.

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531. *Carpue* v. *London Brighton and South Coast Railway Company.*—Action for personal injury, resulting from a train leaving the line, whereby the Plaintiff was injured. On the first trial, before Chief Justice Lord Denman, at the Middlesex Sittings after Michaelmas Term, 1842, the Judge told the Jury that they must be satisfied that the injury had been brought about by the negligence of the Company in the course of carrying the Plaintiff upon the railway. It having been shown that the exclusive management both of the machinery and railway was in the hands of the Company, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced, which explanation the Plaintiff, not having the same means of knowledge, could not reasonably be expected to give. His Lordship also adverted to the suggestion of a witness that the speed was too great for the state of the rails at the spot, as furnishing one hypothesis that might account for the accident. Verdict was given for the Plaintiff.

On the appeal case Chief Justice Lord Denman said—"The only question remaining for our decision is whether the Company were entitled to a notice of action under section 253 of their Act. We think there is no foundation for any argument in favour of the necessity of a notice, and that the Plaintiff is entitled to retain his verdict." Judgment against Company.—

Tried in the Court of Queen's Bench, Hilary Vacation, 1844.—*From Adolphus and Ellis's Queen's Bench Reports, vol. 5, page* 747.

532. *Skinner* v. *London Brighton and South Coast Railway Company.*—Action for personal injury. The treasurer of a benefit society called the Printers' Pension Society hired a train from the Company for an excursion, London to Brighton and back, The Company were to receive a lump sum for the train, but if more than a particular number of persons were carried the Company would be paid a larger amount. The tickets for the excursion were sold and distributed by the treasurer of the society, from whom the Plaintiff purchased one. On the return from Brighton to London, and it being dark, a collision took place, in consequence of a luggage train having broken down. The Company pleaded that there was no evidence that the Plaintiff was a passenger to be carried by the Company for hire. On the first trial the Judge told the Jury that the fact of the accident having occurred was of itself *primâ facie* evidence of negligence on the part of the Company, and left it to them to say whether the Plaintiff was a passenger as alleged. The Jury found a verdict for the Plaintiff on both issues, and this Judgment was affirmed on appeal.—*Tried in the Court of Exchequer, November* 8, 1850.—*From Welsby, Hurlstone, and Gordon's Exchequer Reports, vol.* 5, *page* 787.

533. *Theobald* v. *Railway Passengers' Assurance Company.*—Action for personal injury on a railway passenger's insurance ticket for £1,000.

A personal injury occasioned by slipping from the step of a railway carriage, while in the act of stepping to the platform for the purpose of crossing the line to obtain a fresh ticket in order to continue a railway journey, constitutes a "railway accident" within the meaning of a contract of insurance (under the powers conferred on the Railway Passengers' Assurance Company by the statutes 12 & 13 Vic., cap. 40, and 15 & 16 Vic., cap. 100—local and personal) stipulating that the sum assured shall be payable to the legal representatives of the assured in the event of death happening to the assured whilst travelling in any class carriage on any line of railway in Great

Britain or Ireland, or that a proportionate part shall be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. The damages recoverable for a railway accident are confined to compensation for bodily pain and suffering and the amount of the medical attendant's bill, and damages for loss of time and profits are not recoverable. —*Tried in Court of Exchequer, June* 13, 1854.—*From Law Journal Reports, vol.* 23, *page* 249.

534. *Jane Birkett (Executrix of J. Birkett, deceased)* v. *Whitehaven Junction Railway Company.*—Action for personal injury. J. Birkett took a ticket from Workington to Carlisle from the Whitehaven Junction Railway Company. In order to arrive at the platform at the station at Maryport, the train passes over the line of the Maryport and Carlisle Railway. On that line is a self-acting switch, used for shunting carriages into a siding. The switch and siding were the property of the Maryport and Carlisle Railway, but used exclusively by the Whitehaven Junction Company. The switch is about four yards from a gate which is on the line of the Whitehaven Company, a servant of which Company was in the habit of occasionally looking over the gate to see if the switch was in proper order. It was proved that all switches are liable to get out of order. A train of the Whitehaven Junction Railway Company coming by slowly to the station, in consequence of the points being turned the wrong way, ran into the siding and came into collision with some cattle trucks, whereby Birkett was killed. The Judge left it to the Jury to say whether there was negligence on the part of the Whitehaven Junction Company. The Jury found that there was. Held—That the question was properly left to the Jury, that there was evidence of such negligence, and that upon such finding the Whitehaven Junction Railway Company were liable under the 9 & 10 Vic., cap. 93, to an action by the personal representative of Birkett.—*Tried in the Court of Exchequer, May* 21, 1859.—*From Hurlstone and Norman's Exchequer Reports, vol.* 4, *page* 720.

535. *Scott* v. *Dublin Wicklow and Wexford Railway Company.*—Action by Mrs. Scott, a third class passenger, for damages

for personal injury at Dundrum Station. Train overshot platform; passenger opened door, jumped out on to and over a bridge, and fell into road below. Three witnesses in compartment proved she jumped out before train actually stopped. Plaintiff's pleas —(1) That name of station was called out, and she thought it was the proper place to alight; (2) the bridge was unfenced and dangerous; (3) that the gas light was insufficient (it being evening time); (4) the Company negligently passed the platform and gave no notice. Company pleaded contributory negligence on Mrs. Scott's part. Verdict for Plaintiff, £500.—*Tried before Chief Baron Pigott and a Special Jury, June* 16, 18, 19, *and* 21, 1860.—*Irish Common Law Reports, vol.* 11, *page* 377.

536. *Stockdale* v. *Lancashire and Yorkshire Railway Company.*—Action for £20 for personal injury. Plaintiff, a young lady, who resided near Liverpool, went to High Town on 10th August to witness a military sham fight. At 10 p.m. she went to High Town Station to return home. There was such a crowd round the ticket office she could not procure a ticket. Plaintiff, with her friends, then told the guard, who brought a light and gave them permission and put them in his van with other passengers. She told the guard she wished to alight at Marsh Lane Station. The train stopped at Marsh Lane, but the guard's van was not brought up to the platform. The guard got out and went up to and along the platform. Plaintiff was being helped out by a friend when the train, without any notice, started, and Plaintiff was jerked out, thrown down, and severely injured. The Plaintiff, on recovery, informed the station-master the manner in which she travelled, and paid the proper third class fare. The case was first tried at Liverpool before Baron Martin, and a verdict was given for £20, leave being given to set it aside on the ground of negligence of Plaintiff in getting out when the carriage was not up to the platform. On the appeal case Baron Bramwell, in giving Judgment, said—"The Plaintiff could not get to the ticket office for a ticket, and she had some difficulty in getting to the train, and when she did it appears she got in, with others, into the guard's van by his permission. He got a light and told her where to sit. She was lawfully a passenger in the train. If the train had stopped

the usual time to enable the passengers to get out there could have been no complaint; but there was a clear breach of duty on the part of the Company or their servants in not stopping the train a sufficient time at the station reasonably to allow the passengers to get out. It stopped a moment at the Marsh Lane Station, but did not draw the van she was in up to the platform. She attempted to get out when it stopped (she was at the doorway waiting for the train to stop), but before she could be assisted out the train went on, and jerked her out in such a manner as to cause the accident. The train went on, and did not stop at all again at that station." Chief Baron Pollock and Baron Martin concurred. Judgment against Company.—*Tried in the Court of Exchequer, May* 2, 1863.—*From Law Times Reports, vol.* 8, *page* 289.

537. *Foy* v. *London Brighton and South Coast Railway Company.*—Action for personal injury. Mrs. Foy was a passenger, Croydon to London. On arrival at London, owing to another train happening to be at the platform, the carriage in which Plaintiff rode stopped outside the station, where there was no platform, but the carriage would soon have been drawn up. One of the Company's officers told Plaintiff that if she wished to get out she might do so, which she did. Instead of putting her feet to both the steps of the carriage and so getting down, she took a gentleman's hand and jumped from the top step, and in so doing injured her spine very considerably. It was proved at the trial she was a person of delicate health. The case was first tried at Guildhall, London, before Chief Justice Erle, when a verdict was found for Plaintiff of £500. The Company appealed, and on the appeal case Justice Williams said—"I am of opinion the verdict should stand. The conduct of the Company was such as to render it a question for the Jury whether there was negligence on their part or not, and I think they were justified in finding as they did. The question is—Had Mrs. Foy forfeited her right to compensation by her own act? I think she had not." Chief Justice Erle concurred. Judgment against Company.—*Tried in Court of Common Pleas, Jan.* 14, 1865.—*From Law Times Reports, vol.* 11, *page* 606.

538. *Harrold* v. *Great Western Railway Company.*—Action for £50 for personal injury. Plaintiff was a passenger from Wells to Bath. On arrival at Limpley Stoke Station, several miles short of Bath, Plaintiff desired to get out. Two or three of the foremost carriages had overshot the platform, and Plaintiff was in one of them. It was 10.30 p.m., and the night was dark and rainy. The carriage had stopped on an embankment raised some height above a roadway immediately beneath it. From the outer rail to the edge of the embankment is four to five feet, and at the bottom of the slope is a wall. Two fellow-passengers alighted safely. Plaintiff then followed, *knowing that the carriage was beyond the platform.* He missed with his foot the lower step of the carriage, stumbled and fell over the embankment into the road beneath, and sustained severe injury. There was no light in the carriage, and no stationary light on the platform, but Plaintiff saw the station-master coming down the platform with a hand-lamp. The case was first tried at Bradford, in the Wiltshire County Court, when Plaintiff was non-suited. He then appealed to the Court of Exchequer, when Baron Bramwell said—"I am of opinion the non-suit was rightly directed. It was contended by Plaintiff that the Company ought to have fenced off the line of rail beyond the platform from the roadway. No doubt there is a duty on a railway company to fence their line, but that is a duty towards persons who are off the line to prevent them from straying or getting upon it. There is no duty on them to fence as towards passengers or persons who are already on the line, and where is to be the limit to the extension of the fencing? How far beyond the platform of the station is the fence to be continued? But there is another answer to the Plaintiff: he should not have got out, but have sat still until the carriage he was in was drawn up to the platform, and if he had been taken on against his will, have brought an action against the Company for so carrying him beyond his destination and not providing proper means for his getting out of the carriage at the desired station." Chief Baron Pollock and Baron Martin concurred. Judgment for Company.—*Tried in Court of Exchequer, April* 30, 1866. —*From Law Times Reports, vol.* 14, *page* 440.

539. *Siner* v. *Great Western Railway Company.*—Action for strain to knee from jumping out of an excursion train when the carriage was beyond the platform—West Bromwich to Rhyl. An excursion train in which the Plaintiffs (husband and wife) were passengers arrived at the Rhyl Station when it was daylight, and, the train being a long one, the carriage had overshot the platform. The passengers were not warned to keep their seats, nor was any offer made to back the train to the platform, nor was it backed. After a short time the husband, following the example of other passengers, alighted without any request to the Company's servants to back the train. The wife, standing on the iron step of the carriage, took both his hands and jumped down, and in so doing strained her knee. There was a footboard between the iron step and the ground, which she did not use, but there was no evidence of any carelessness or awkwardness in the manner of descent except such as may be inferred from the above facts. Barons Martin, Bramwell, and Pigott held that there was no evidence for the Jury of negligence in the Company, and that the accident was entirely the result of the Plaintiffs' own acts. Chief Baron Kelly dissented, holding that the stopping of the train at the station without any notice to the passengers not to get out was an invitation to them to do so. The descent at that place was dangerous, but not so clearly dangerous that the Plaintiffs might not properly encounter the risk; and the Company having wrongfully put the passengers to the necessity of choosing between two alternatives—the inconvenience of being carried on, and the danger of getting out—they were liable for the consequences of the choice, provided it was not exercised wantonly or unreasonably. The Judgment of the majority of the Court was for the Company.—*Tried in Court of Exchequer, May* 1, 1868.—*From Law Reports, Exchequer, vol.* 3, *page* 150.

An appeal was taken to the Exchequer Chamber, where the decision of the Court below was affirmed that there was no evidence for the Jury of negligence in the Company, and that the accident was entirely the result of the Plaintiffs' own acts.—*Tried in Exchequer Chamber, Feb.* 9, 1869.—*From Law Reports, vol.* 4, *Exchequer, page* 117; *also Law Journal Reports, vol.* 38, *page* 67.

540. *Whittaker* v. *Manchester Sheffield and Lincolnshire Railway Company.*—Action for £1,000 for personal injury. Plaintiff arrived at Newton Station, where he desired to alight. The train extended beyond the platform, and Plaintiff's carriage was drawn up alongside the parapet of a bridge over a street. The night was dark and misty. The name of the station, "Newton for Hyde," was called out; Plaintiff stepped out on the parapet, fell over the bridge twenty feet into the street below, and received serious injuries. The case was first tried at Manchester Assizes, when the Judge left it to the Jury to decide whether the circumstances amounted to an invitation to the Plaintiff to alight, and that there was negligence on the Company's part to justify a verdict against them. The Jury gave a verdict for £1,000 against the Company. The Company appealed, when Chief Justice Bovill gave Judgment—"In the case now before us the train drew up at the station where it ought to stop; the name of the station, 'Newton for Hyde,' was called out before and after the stoppage took place, and a passenger might expect reasonable accommodation for the purpose of alighting. Here the facts reasonably led the Plaintiff to believe this was the platform; instead of drawing up to the platform, this carriage was at a place which in the dark appeared like the platform, and which was dangerous. The Company provided a proper platform, but their servants neglected to avail themselves of it, and set a trap for the Plaintiff. The question of invitation (to alight) should generally be decided by the constituted tribunal, the Jury. I think the Judgment must be against the Company, and I think the facts justified the finding of the Jury, and there was nothing in the case to induce the Jury to find the other way." Justice Willes concurred.—*Tried in Court of Common Pleas, June* 7, 1870.—*From Law Times Reports, vol.* 22, *page* 545.

541. *Plant* v. *Midland Railway.*—Action for a sprained foot. The train stopped at Market Harborough Station, and Plaintiff's carriage overshot the platform. The name of the station was called out. Plaintiff got out in a dark spot on some rough ground, and the sprain occurred. Justice Black-

burn said—"It is manifest Plaintiff did not hurt himself by reason of the want of sufficient accommodation, but by the reason of the want of ordinary caution on his own part. He said in his evidence—'I knocked at the door, and no one came; I opened it and got out. I had passed the platform—that I knew; and I had passed the station wall—that I also knew.' The truth is, he got out without looking. He must be taught to take care of himself." Non-suit in favour of Company.—*Tried in Court of Exchequer, Feb.* 1, 1870.—*From Law Times Reports, vol.* 21, *page* 836.

542. *Cockle* v. *South Eastern Railway Company.*—Action for personal injury, resulting from Plaintiff, a female passenger, tumbling down at Deptford Station in getting out of a carriage at night at a place where there was no platform. The platform at the end of the station recedes gradually from the main line to allow of a siding to the engine-house. The train drew up short of the proper place, and the last carriage, in which Plaintiff travelled, was not alongside the platform. The light at this end of the station was bad. Among those who came to lift up Plaintiff was an inspector, who said it was the driver's fault in drawing up short. The case was first tried before Chief Justice Bovill, who left the case to the Jury, who gave a verdict for Plaintiff. Leave of appeal was given Company to enter a non-suit on the ground that there was no evidence to go to the Jury. On the appeal case the four Judges were equally divided, so that no Judgment was arrived at, and the verdict stood. Justice Montague Smith said—"I think there was not sufficient affirmative evidence of negligence on the part of the Company for the Jury, and that even if there was yet the accident was the consequence of the Plaintiff's own act. If there had been an invitation (to alight) the Company would have been liable, but the evidence falls short of that; there was no such evidence that she was invited to descend." Justice Keating said—"Now I think, as far as a rule can be extracted from previous cases tried, that if there be no invitation to alight the passenger does it at her own risk. I do not say that is so absolutely and under all circumstances, but that as a general rule this is so. There were no lights at the place where the carriage stopped; there was no cry of the name of the station, no opening

of the doors, and an absence, beyond the mere fact of stopping, of anything which can be called an invitation to alight. Now it has been held that even crying out the name of the station and stopping is not an invitation to alight. As I have already said, if there be an absence of invitation to alight, the decisions show that the passengers alight at their own peril; and here the Plaintiff, opening the door herself, steps short of the platform, and thus the accident occurs. Ought she, then, to have kept her seat? The decisions show she ought, and by those decisions I am constrained, much against my own opinion, to conclude that there was not evidence for the Jury to reasonably and properly find for the Plaintiff."

Chief Justice Bovill said—"The train, in point of fact, did not draw up where it ought, and the inspector himself said that this arose from the default of the driver of the engine. As to evidence of negligence, there was clear evidence of negligence on the part of the driver in not bringing the train to where he ought. This, however, is not sufficient, but it is necessary to show that this negligence caused the accident. But, after consideration, it seems to me that previous cases are distinguishable, and that there are none to govern us here. In *Petty* v. *North London* there was no element of belief in the invitation to alight; here there was strong evidence that the Plaintiff did, and was led by the Company to believe that she was to alight. Belief, however, is not alone sufficient, unless the Company led the Plaintiff so to believe. In *Plant* v. *Midland* the Plaintiff knew he was not at the platform, knew what was the danger, if any, and knew what caution was required. In *Bridges* v. *North London* the carriage was not at the platform, it was in a tunnel; it was dark, and the Plaintiff could not see, and there was nothing to induce him to think that he had arrived at the platform; here, on the contrary, the Plaintiff was induced so to believe. In *Harrold* v. *Great Western* the Plaintiff knew the train had overshot the platform, and yet got out. In *Siner* v. *Great Western* the female Plaintiff equally knew there was no platform, and yet took her chance, assisted by her husband, and took the risk, therefore, on herself." Justice Brett concurred with Chief Justice Bovill that the Judgment should be against the Company, while the other two Judges held the reverse.—*Tried in Court of Common*

Pleas, May 10, 1870.—*From Law Journal Reports, vol.* 39, *page* 226.

An appeal was taken to the Court of Exchequer Chamber, February 10 and May 23, 1872, when the Judgment was against the Company, and it was held that an invitation to railway passengers to alight on the stopping of a train, without any warning of danger to a passenger who is so circumstanced as not to be able to alight without danger, such danger not being visible or apparent, amounts to negligence on the part of the railway company. The bringing up of a train to a final standstill for the purpose of the passengers alighting amounts to an invitation to alight—at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out if he proposes to alight at the particular station.—*From Law Journal Reports, vol.* 41, *page* 140.

543. *Daniel* v. *Metropolitan Railway.*—Action for personal injury. The Corporation of the City of London was authorised by an Act of Parliament to execute certain works over the line of the Metropolitan Railway Company. These works consisted partly in placing heavy iron girders upon the walls running along the line of railway, and were therefore works in the execution of which danger was involved, which were often executed elsewhere without mischief. The Railway Company had no control over these works, which were executed by contractors engaged in the Corporation. Several girders had been safely put in their places by manual labour, but on this occasion the contractors brought into use for one of the girders a monkey steam engine, which moved the girder with a jerk, and so caused it to overbalance and fall. It fell on a passenger train, and injured the Plaintiff.

Held—That this was not a mischief the occurrence of which the Defendant Railway Company were bound to anticipate, and against which it was bound to take precautions, and consequently the Railway Company was not liable in damages.—*Tried in the House of Lords, February and March,* 1871.—*From Law Reports, House of Lords, vol.* 5, *page* 45.

544. *Praeger* v. *Bristol and Exeter Railway Company.* Action for £1,500 for personal injury. Plaintiff arrived at a

terminal station of the Company's in the last compartment of the last carriage of a train. The engine stopped some fifteen to twenty feet from the terminal fixed buffers at extreme end of station platform. The arrival end of the platform was bevelled off into a curve so as to allow space for a siding which there joined the platform siding. Plaintiff's carriage stopped where this curve was situated, and the distance from the carriage to the platform was estimated at from eighteen inches to two feet. A step projected from the carriage, so that the distance from the edge of the step to the platform would be a few inches less. There were three lights at the station, but no light was thrown on this particular space. When the train stopped the guard opened the carriage door, but made no remark. Plaintiff, in getting out, fell between the carriage and the platform, and received injuries. On the first trial the Jury gave a verdict of £1,500 against the Company. The Company then appealed to the Exchequer Court, when this verdict was set aside. Plaintiff then appealed to the Exchequer Chamber, when Chief Justice Cockburn gave Judgment. He said—"The question is whether there was a want of reasonable care on the part of the Company, and I think there was not only evidence, but abundant evidence, of this. The state of things was this, that whereas the carriage in which the Plaintiff was would have been brought up to the platform if the train had moved further, the Plaintiff got out believing he was going to step on to the platform. Instead of that he fell between the carriage and the platform. He got out on the invitation of the guard, who opened the door, which implied an invitation to alight, and I think also to alight with safety. Under the circumstances a person would be justified in expecting to step on to the platform, and it was incumbent on the guard, if he intended passengers to get out, to warn them of the position of the platform. He gave no such warning, and that omission seems to me to amount to negligence, which is the whole question. The question of contributory negligence is not before us. Whether the Plaintiff might, by the use of more caution, have avoided the danger, is a question which might have been decided otherwise by the Jury. It was left to them, and no leave was reserved on that point, and we, therefore, have

nothing to do with whether their verdict was right or wrong." Justices Willes, Mellor, Keating, Smith, Lush, and Brett concurred. Judgment against the Company for the £1,500.—*Tried in Court of Exchequer Chamber, February* 9 *and* 10, 1871.—*From Law Times Reports, vol.* 24, *page* 105.

545. *Bridges* v. *North London Railway Company.*—Action by a widow for the death of her husband. Plaintiff was about fifty-two years of age and short-sighted. He was a season ticket traveller between London and Highbury. On the 20th January, 1869, deceased left Broad Street Station at 6.40 p.m. in a train of five or six carriages. He took his seat about the middle compartment of the last carriage, the guard's van being behind. At the approach to Highbury Station from Broad Street is a tunnel, and about twelve feet of narrow platform extends into the tunnel. There is a slope down from the end of this platform on to the line. At the end of the slope was lying a heap of rubbish, about sixteen inches high, and extending 50 feet into the tunnel (possibly ballast to be spread). The lamp in the tunnel was four to five feet from the entrance, and 27 feet 11 inches from where deceased was found. The train was 180 feet, and it stopped on this night short of the platform, leaving about 38 feet of train in the tunnel, or the last carriage and half of the next being in the tunnel. While the train was in this position a witness got out of the last carriage but one, having heard the name of the station, "Highbury," called. When he was out he heard "Keep your seats" also called out. This witness heard a groan, which proceeded from the deceased, who was found lying on the rubbish at the end of the slope of the platform. The deceased was about ten feet from the slope, in the tunnel. It appeared deceased had endeavoured to get out, and in doing so fell upon the rubbish and broke his leg, and received internal injuries, from which he died. The train was afterwards moved on to the station. Baron Pigott gave Judgment—"It is not very certain what the state of the light was at the spot. I infer from the evidence there was not a want of light. It was argued there was negligence on Company's part (1) in stopping the train short of the platform; (2) in calling out the name of the station while part of the train was in the tunnel. I am o

opinion, whether those two circumstances be regarded separately or together, they do not afford any proof of negligence. The driver may have had good reason for bringing the train to a stop, because of some signal or object in the way. What is the true meaning to be attached to calling out the station? It was argued that it was an invitation to the passengers to alight, and as it was dangerous to get out it was improper at such a time to give the invitation. I think that is not a true view. The name of the station is called out as the train passes into the station and is in motion. The call out cannot be intended to supersede the necessity of each passenger seeing to his own safety in descending from a carriage, and it no more means it to be implied that every carriage is at the platform than it does that the particular platform is on the ordinary and most usual side of the train. The object intended and accomplished by it is to give notice to the passengers of the name of the particular station at which the train is arriving or has arrived, so that each one may know whether it is the place to which he is destined. The circumstance of the carriages being in a tunnel, and by night instead of day, seems to me only to throw on the passenger the more blame for leaving the carriage when and where he could not see the properly lighted platform, or could see that he was not at any platform. It is suggested deceased may have mistaken (through defect of sight) the place where he fell for the platform. But this is speculation. There is not the slightest evidence that he did so. But even if this hypothesis were correct, how can a railway company be required to adopt a different practice towards persons who, unknown to them, happen to be short-sighted or actually *blind*, from what they observe towards all the public? My Judgment is based upon this, that the two circumstances, viz., stopping short of the station and calling out the name of the place, do not, either separately or taken together, afford any reasonable evidence of negligence or improper conduct on the part of the Company's servants; and there is nothing else in the case from which any inference of negligence can be drawn or suggested." The majority of the Court concurred in a verdict for the Company. —*Tried in Court of Queen's Bench, May* 11, 1871.—*From Law Reports, Queen's Bench, vol.* 6, *page* 377.

Plaintiff appealed to the Court of Exchequer Chamber, when the majority of the Court affirmed the decision of the Court of Queen's Bench.

Plaintiff again appealed to the House of Lords, who gave Judgment against the Company, reversing the previous decisions. Held—That without laying down any rule as to the effect, in all cases, of the Company's servant calling out the name of the station, the evidence of the calling out the name in this case, coupled with the stoppage of the train and the interval of time which elapsed before it was again moved on, was evidence which ought to have gone to the Jury, as it was, in the absence of rebutting evidence on the part of the Company, sufficient to authorise their finding a verdict for the Plaintiff.—*From Law Journal Reports, vol.* 43, *page* 152.

546. *Hanson* v. *Lancashire and Yorkshire Railway Company.*—Action for personal injury. Plaintiff was travelling in a train from Miles Platting to Manchester. Just after leaving Miles Platting a goods train came from the opposite direction on the other line. On this goods train was a truck loaded with timber trees, and just before the trains met one of these trees got loose and projected over the side of the truck, and when the two trains were passing each other the timber struck the carriage in which the Plaintiff was travelling, and so caused the injury for which this action was brought. The Company contended that the chain broke from a latent defect, undiscoverable by reasonable care, and that such breakage was the cause of the accident. The Plaintiff, on the other hand, contended that the accident itself was the cause of the chain breaking. It was shown that a safer and better mode of loading timber on railway trucks had been introduced of late years, by which the timber was held in its place by iron stanchions as well as by chains; but it was also shown that many railway companies had not adopted the new method, and it was not shown that any accident had ever happened from using the old method.

Justice Brett said—"As to implying negligence from the mere happening of the accident, it must be remembered that this was a wholly unusual accident. If the only evidence was

that of the accident happening, and of the latent defect of the machine, I should say there was no evidence to go to the Jury. Lord Denman's ruling in *Carpue* v. *London Brighton and South Coast Railway* was relied on, but that was a ruling at Nisi Prius not reviewed by the Court, and I find this with reference to it, in *Hodges on Railways*, 4th edition, page 531:—

'Although in one case it was ruled otherwise by Lord Denman, it seems now to be clearly established that, in order to render the company liable for negligence, it is necessary to give affirmative proof of negligence on their part, and it is not safe merely to prove the occurrence of an accident, and to rely upon that as *primâ facie* evidence of negligence. In some cases, *res ipsa loquitur*, the accident may be of such a nature as that negligence may be presumed from the mere occurrence of it, but when the balance is even the onus is on the party who relies on the negligence of the other to turn the scale.'

That is, I think, a correct exposition of the law. The Jury are not to find for the Plaintiff unless they can see negligence in the Defendants."

Thus it was held by the Court that it was for the Plaintiff to show that the accident was caused by the Defendants' negligence, and that they were not bound to show how the accident happened. Judgment for Company, rule being refused.—*Tried in the Court of Common Pleas, Jan.* 15, 1872.—*From Weekly Reporter, vol.* 20, *page* 297.

547. *London and North Western Company* v. *Hellawell and Wife.*—Action for £50 for a broken leg, which occurred by the lady falling when about getting out of the train at Huddersfield. The lady was a second class passenger, Manchester to Huddersfield. On the train arriving at the Huddersfield Station, several porters ran to the train before it stopped, and unlocked and threw open the doors of several carriages, and the particular carriage in which Plaintiff travelled, and called out "All out for Huddersfield." She had got her foot on the carriage step to get out, when the brake, which had been applied, was suddenly taken off, which caused an increase of speed, and she then fell on the platform and received the injuries. The case was first tried at the Huddersfield County Court, when the Jury gave a verdict against the Company for £50. The Company appealed to the Court of Exchequer, when Baron Pigott said—

"This case is very distinguishable from *Bridges* v. *North London* (where it was held that the calling out of the name of the station was only an intimation that the train had arrived at that station, and not an invitation to alight before the train had stopped). There the porter merely called out the name of the station. Here his conduct almost amounts to an order to the passengers for Huddersfield to get out. How can it be said that the Plaintiff was not induced by the porters to get out as she did? Moreover, whilst she is getting out, an increase of speed takes place in the train. I think that alone was negligence." Baron Martin concurred. Judgment against Company. —*Tried in Court of Exchequer, May* 8, 1872.—*From Law Times Reports, vol.* 26, *page* 557.

548. *Lewis* v. *London Chatham and Dover Railway Company.*—Action for personal injury. Plaintiff, Mary Ann Lewis, took a third class ticket, St. Mary's Cray to Bromley, on 7th October, 1871. On arrival of the train at Bromley at 7.29 p.m., it overshot the platform. The name of the station, "Bromley," "Bromley," was called out. The train came to a standstill, and Plaintiff's carriage was at the end of the platform, and beyond the end of the platform there was a bridge. Plaintiff had her hand on the door, and her foot on the step, and it would appear was about to take her basket from an old gentleman who was inside holding it, when a sudden jerk of the train backing threw her off the step at the end of the platform, and just off the platform. The case was first tried in the Westminster County Court, when the Jury gave Plaintiff £20 damages. The Company applied for a new trial, and their application was granted, and the case was re-tried before the same County Court Judge and a Jury. The Judge held there was no evidence of negligence on the Company's part, and desired to non-suit Plaintiff, who, however, would not consent, and the Judge then directed a verdict for the Company. Plaintiff appealed.

On the appeal case Justice Blackburn said—"I am of opinion there was no evidence of negligence upon which a Jury could reasonably find for Plaintiff. The name of the station was shouted out by the porters, but this was done to convey information to the passengers that the station had been reached,

and of itself meant nothing more. Plaintiff knew the station well. I see nothing on the part of the Company to induce her to get out, when from the circumstances stated she had every reason to believe that she was not to get out unless she should be expressly requested to do so. I do not at all agree that 'Bromley,' 'Bromley,' being called meant 'Jump out.' The calling out of the name of the station is generally done just as the train is drawing up and before it has quite stopped, and this is a matter of common knowledge. It is, in fact, done by way of preparing passengers to get out. As for the case of *Cockle* v. *South Eastern Railway Company*, that is as distinguishable from the present as it could possibly be." Justice Quain concurred. Justice Archibald concurred, and said—"It must be that the Plaintiff got out very indiscreetly and hurriedly, and at a time when she had no intimation or invitation to get out." Judgment for Company.—*Tried in Court of Queen's Bench, Nov.* 11, 1873.—*From Law Journal Reports, vol.* 43, *page* 8.

549. *Weller* v. *London Brighton and South Coast Railway Company.*—Action for personal injury. Plaintiff, a season ticket-holder, was travelling from London Bridge to Selhurst on 30th November, 1872. The train arrived at Selhurst about 7 p.m., and the night was very wet and dark. Plaintiff heard "Selhurst" called out, and heard the noise of carriage doors opening and shutting. He was in the second carriage from the engine. He opened the door, put his foot on the step, and then made another step, expecting to step on the platform. It appeared the carriage was a yard beyond the end of the platform, and consequently Plaintiff fell about four to five feet on to the embankment. The only light near where the accident occurred was a lamp 49 feet from the end of the platform. The train did not back, but went on a few minutes after the accident. The case was first tried before Chief Justice Bovill, at the Middlesex Sittings, 1873, when the Judge non-suited Plaintiff, with leave to appeal, fixing the damages at £100 if the Appeal Court should be of opinion that there was evidence of negligence by the Company on which the Jury should have formed a verdict for Plaintiff, the Court to be at liberty to draw inferences of fact.

On the appeal case Justice Brett said—"I am of opinion the Judgment should be against the Company. In the present case the name of the station was called out as the train was coming into Selhurst Station, and the train soon afterwards stopped; and I think the fair inference to be drawn from the evidence is that it came then to a final standstill, for after it had stopped doors were heard to open and passengers got out, and one witness, who was a passenger, stated that he did get out upon the platform, and that he afterwards saw the Plaintiff leave the carriage and fall. The train never gave any sign of backing, but after the accident proceeded on its journey without ever backing. I agree that it is not negligence to call out the name of the station before the train has come there to a standstill, or for the engine-driver to overshoot the platform; but if one of the Company's servants has called out the name of the station, and the other in charge of the engine has overshot the platform, then I think there is evidence of negligence if no warning is given to the passengers, so as to prevent them from doing what they would naturally do under those circumstances, namely, alighting when the name of the station has been called out and the train has stopped. And if a passenger under those circumstances, after waiting a reasonable time and receiving no warning to the contrary, gets out, he has a right to suppose that it is intended he should do so. I think there was no contributory negligence by the Plaintiff." Justice Denman and Justice Honeyman concurred. Judgment against the Company.—*Tried before the Court of Common Pleas, January* 24, 1874.—*From Law Journal Reports, vol.* 43, *page* 137.

550. *Robson* v. *North Eastern Railway Company.*—Action for £100 for personal injury, resulting from Plaintiff, a female, getting out of a carriage at Benton Station which had overshot the platform. It was in daylight. The train had come to a stand. The station was a roadside station with only a station-master, who was attending to luggage at the van. Plaintiff, when attempting to get out of the carriage, had on her left arm a small bag, and in her left hand a small empty basket, small quart can, and an umbrella. She had hold of the

door with her right hand, and had one foot on to the footboard, and whilst endeavouring to get the other foot on to the footboard she lost her hold of the carriage door, slipped, and fell. The case was first tried at Newcastle Summer Assizes, 1874, before Justice Archibald, who directed a non-suit on the ground that there was no evidence of negligence on the part of the Company. Leave to appeal was given, and £100 fixed as the damages if the Appeal Court held in favour of Plaintiff.

On the appeal case Justice Field said—"We think the mere overshooting the platform is not evidence of negligence. But in this case the train had come to its final standstill. The Plaintiff, therefore, having been invited to alight at a spot at which the ordinary and usual means of descent were absent, we think that the duty of the Company not to expose passengers to undue danger required them to provide some reasonable, fit, and safe substitute. It has been argued that the injury here was the result, not of any want of care on the part of the Company, but was caused by the voluntary act of the Plaintiff herself in endeavouring to alight of her own will and with her eyes open. But it has been long established that if a person, by a negligent breach of duty, expose the person towards whom the duty is contracted to obvious peril, the act of the latter in endeavouring to escape from the peril, although it may be the immediate cause of the injury, is not the less to be regarded as the wrongful act of the wrongdoer—*Jones* v. *Boyce* (1 Stark., 493). In *Adams* v. *Lancashire and Yorkshire* Justice Brett said—'If the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carlessness, the person causing the inconvenience by his negligence would be liable for an injury that might result from an attempt to avoid such inconvenience.' The Jury might have found that the Plaintiff, by negligence, contributed to the result; but we cannot see there was conclusive evidence that she did, rendering it the duty of the Judge to have withdrawn the case from the Jury." Judgment against the Company.—*Tried in Court of Queen's Bench, April* 22 *and May* 8, 1875. —*From Law Journal Reports, vol.* 44, *page* 112.

The Company carried the case to the Court of Appeal, before Chief Justice Lord Coleridge, Lord Justice Mellish, Justices

Brett and Amphlett, who held there was evidence of negligence to go to the Jury. This was Judgment against the Company. —*Tried in Court of Appeal, November* 10, 1876.—*From Law Journal Reports, vol.* 46, *page* 51.

551. *Rose* v. *North Eastern Railway.*—Action for £100 for personal injury in getting out of a train at Washington Station that had overshot the platform. There was a bazaar at the place, which led to excursion trains and crowds of passengers. The porters cried out "Keep your seats," but Plaintiff did not hear them; she, however, waited for some time, expecting the train would be put back, and then, fearing she would be taken on, she got out, and suffered the injury. The train went on, and her carriage was not put back to the platform. On the first trial a verdict for £100 was entered by consent for Plaintiff, leave being given to appeal. On the appeal to the Court of Exchequer, the Court was of opinion there was no evidence of negligence, and gave Judgment for the Company. The Plaintiff then carried the case to the Court of Appeal, when Chief Justice Cockburn said—"It seems to me that this is the clearest of all cases, and it is clear the Judgment of the Exchequer Division ought to be reversed. I quite agree that the mere fact that the end of the train had passed the platform, if the passengers could with facility and safety alight, would not be evidence of negligence. It is impossible so to regulate the speed of an engine that the train shall always stop at the precise spot. Persons, however, who have to alight ought not to be exposed to unnecessary danger. I cannot but think that either the train ought to be put back or the passengers should be asked whether they will alight where they are, or something of that sort. They should have the choice of being carried back if they please or getting out where they are, which everyone is not active enough to do without assistance." Justice Brett concurred. Justice Amphlett said—"I am of the same opinion. The state of the law appears to have been different before the decision of *Bridges* v. *North London Railway Company.* The Judges and the Bar were divided as to whether, on a given state of facts, the question of negligence or no negligence was for the Jury or for the

Judge—whether the Jury or the Judge was to draw the necessary inference. By that decision the law was settled that the matter should be left to the Jury, and is binding upon us; yet some Judges have so far retained their own opinions as to decide in opposition to what was the deliberate decision of the House of Lords. The question was also before the Court of Appeal in *Robson* v. *North Eastern Railway Company*, which more than covers the present case. It was decided expressly that the passenger did not act negligently who got out of the train after waiting a reasonable time, so long that he might reasonably believe that if he did not get out he would be carried on to the next station." Judgment against the Company.—*Tried in the Court of Appeal, December* 19, 1876.—*From Law Journal Reports, vol.* 46, *page* 374; *also Law Times Reports, vol.* 35, *page* 693, *and Law Times Reports, vol.* 34, *page* 761.

552. *Owen* v. *Great Western Railway Company.*—Action for £50 for personal injury. Plaintiff was a passenger from Tenby to Merthyr Tydvil. The train consisted of six carriages, it being market day, when an extra carriage was put on. Plaintiff was in the last carriage. The train ran into the usual platform siding at Whitland Junction, but this siding, with the engine full up to the buffer end, would only afford platform accommodation for five carriages, and the sixth carriage was therefore facing the slope of the platform. The time was the middle of the day. The porters called out "Whitland, all change here." Plaintiff knew the junction, and had frequently been there before. Plaintiff's son, eighteen years of age, got out, and Plaintiff followed, but her foot slipped on the iron step of the carriage while she was endeavouring to put her other foot on the wooden step below. She fell on to the platform and was injured. The case was first tried at the Glamorganshire Assizes, before Justice Lush and a Jury, when a verdict of £50 was given against the Company.

The Company appealed, and Justice Lush tried the appeal, and said—"I am unable to discover any wrongful act or omission on the part of the Company or their servants to which this accident can be ascribed. It may be that she would not

have received the same amount of injury had she fallen on the platform from another carriage instead of on the slope; but the Company are not responsible for that unless they were bound to have a platform not merely long enough for the ordinary traffic, which this was, but long enough to reach to the end of the longest train that came there—a proposition which I think cannot be maintained. The question is reduced to this—Was the place where the Plaintiff was required to alight a safe or a dangerous place—that is, was it a place where persons of ordinary intelligence and physical capacity, exercising reasonable care, could alight without risk of injury? Nothing to the contrary was suggested at the time. Had the train arrived at night time, and there had not been sufficient light at that spot, or any warning given to passengers in that carriage that it was below the platform, and if a passenger had stepped out in the belief that he was stepping on to the platform, and had so met with injury, no doubt the case would have been different. I am of opinion there was no legal liability, no evidence to go to the Jury of negligence." Judgment for Company.—*Tried in Court of Queen's Bench, May* 10 *and* 12, 1877.—*From Law Journal Reports, vol.* 46, *page* 486; *also Law Times Reports, vol.* 36, *page* 850.

553. *Flannery* v. *Waterford and Limerick Railway Company.*—Action for personal injury, arising from the wheel of a carriage breaking, whereby the carriage left the rails near Six Mile Bridge, and Plaintiff was injured. Defendants' counsel asked for a direction on the ground that there was no evidence of negligence proper to be submitted to the Jury. The Judge left the question of negligence to the Jury, who found for the Plaintiff, leave being given to move for a new trial.

On the appeal case, before Chief Baron Palles, held—That the fact of the accident was sufficient evidence to cast upon the Company the burden of showing that there was no negligence on their part, and as they declined to afford any explanation of the cause of the accident, there was a case for the Plaintiff proper to be submitted to the Jury. He said—"I now gladly turn to one case distinguished from the chaos of authorities depending on particular facts by an attempt at the application of something in the nature of principle to cases of this class—I refer

to *Scott* v. *London Docks Company* (3 H. & C., 601). 'There must,' says Justice Erle in this case, 'be reasonable evidence of negligence. But where the thing is shown to be under the management of the Defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the Defendants, that the accident arose from want of care.'" Judgment against the Company.—*Tried in the Court of Exchequer (Ireland), Jan.* 26, 1877.—*From* 11 *Irish Reports, Common Law, page* 30.

554. *Foulkes* v. *Metropolitan District Railway Company.* —Action for £500 for personal injuries received in alighting from a train at Richmond Station. Plaintiff took a return ticket from New Richmond Station to Hammersmith Station. On the return journey he came back by a Metropolitan District train to Richmond, that Company having running powers over the London and South Western Company's line to Richmond. The ticket was issued by the London and South Western Company at Richmond, and the contract of carriage made by that Company. The Metropolitan District Company's carriages are adapted for the station platforms on the District Company's own line, where platforms are only a few inches lower than the floors of the carriages, but at New Richmond Station the platform was 2 feet 3 inches below the floor of the District Company's carriages. Plaintiff arrived at New Richmond Station by the District Company's train at 9.30 p.m., and in alighting put his foot down expecting to find a footboard, but there being no footboard broad enough to receive his foot, he slipped and fell, and was seriously injured. The case was first tried at the Court of Common Pleas, before Chief Justice Cockburn, when the Jury returned a verdict of £500. An application for a rule to set aside the verdict was then made, but failed. The Company then brought the case into the Court of Appeal, and contended they were not the contracting company. Lord Justice Bramwell read the following Judgment:—"In this case the first question is—With whom did the Plaintiff contract? The contract was a contract of carriage—the carriage of him-

self—and who were the carriers? The Defendants (District Company). The carriages are theirs, also the motive power, and the servants driving and conducting; they have a right to carry over the whole length the Plaintiff is to be carried, and they get and keep at least part of the reward for these things. What ground or reason is there for saying they are not the contractors to carry? The journey is indeed in part over the road of the South Western Company, and the servants of the South Western Company in the first instance receive the fare. But how does this affect the case? If the Defendants' servants had in the first instance received the fare, it is clear the contract would have been with the Defendants, and it is therefore clear that the ownership of the road does not affect the question. Nor can it matter whether the Defendants receive the fare by the hands of their own servants or those of others, nor, in truth, that by arrangement with the South Western Company that the South Western Company should receive it mainly for themselves and only in part for the Defendants. The Defendants, I repeat, are the carriers, and the contract of carriage is with them. If the interest of the South Western in the matter affects this reasoning, it would, at the outside, go to show that the two Companies are partners, and the contract was with them jointly. That would not disentitle Plaintiff to recover against these Defendants alone. It is impossible to say that the fare was received for the South Western only. Suppose a receiver were appointed of the South Western tolls and takings, could it be contended that this money could be taken by him without the Defendants being entitled to a share of it? But further, though the contract was with the South Western, the Plaintiff is entitled to recover against these Defendants. In that case there would be no duty of contract, and consequently no cause of action for a nonfeasance. But there would be that duty which the law imposes on all, viz., to do no act to injure another. It is clear that, if a porter of Defendants had run a truck against Plaintiff at Broadway Station and hurt him, he could maintain his action against Defendants; so if he had left the carriage there, and while getting in the train improperly started and he was hurt, or if his hand was wrongfully pinched.

These are clear cases, but the law is the same in cases not so clear—for example, if the carriage he was put in was dangerous, if the step he had to tread on was rotten. Now apply that to the present case. The difficulty is with the question of finding. The Jury have found there was negligence; what was done or omitted was wilful. But the substance of the finding of the Jury is that the carriage was dangerous with reference to the platform, or the platform with reference to the carriage, and that the Plaintiff might and did reasonably act in the belief that they were not in that state, but safe for him to use. In truth, the combined arrangements were a trap or snare, so that, if he had been carried gratuitously, as by a friend, he would have a right of action against him. With the propriety of this finding we have nothing to do. This was according to that finding at tort—whether in them alone or in conjunction with the South Western does not matter—and the Plaintiff is entitled to recover. I say nothing about the authorities. But if this contract had not been a contract with the Defendants, and all that could have been complained of was a nonfeasance by them, I should hold they were not liable." Lords Justices Baggallay and Thesiger concurred. Judgment against Company.—*Tried in Court of Appeal, February* 26, 27, *and March* 9, 1880.—*From Law Times Reports, vol.* 42, *page* 345. *Common Pleas Trial reported in Law Times Reports, vol.* 41, *page* 95; *Law Journal Reports, vol.* 49, *page* 361.

PERSONAL INJURY TO PUBLIC AT GOODS STATIONS—CRANES, ENGINE ASH-PITS, SHUNTING, &c.

	Case No.		Case No.
Randleson v. *Murray* (1838) ...	555	*Paddock* v. *N. E.* (1867)	563
Degg v. *Midland* (1857)	556	*Holmes* v. *N. E.* (1869)	562
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M'Carthy v. *Young* (1861)... ...	559	*Harrison* v. *N. E.* (1874)... ...	566
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555. *Randleson* v. *Murray.*—Action for personal injury. Plaintiff was a porter of a master carter. Defendant kept a

bonded warehouse in Liverpool, and sent a master porter (Wharton) and his men to the warehouse to load some barrels flour, and Wharton took his own tackle with him. A master carter (Taylor) took carts and men to remove the barrels. Plaintiff was one of Taylor's men. From Wharton's tackle breaking Plaintiff was injured, and he claimed from Defendant, owner of the warehouse. Defendant contended that the remedy was against Wharton and not him. Justice Littledale said—"It seems to me to make no difference whether the persons whose negligence occasions the injury be servants of the Defendant, paid by weekly wages, or be brought to the warehouse by a person employed by the Defendant." Justice Patteson said—"The case of a carrier is quite distinct. He has goods in his custody as a bailee." Judgment against warehouseman.—*Tried in the Court of Queen's Bench, April* 21, 1838.—*From Adolphus and Ellis's Reports, vol.* 8, *page* 109.

556. *Degg* v. *Midland Railway Company.*—Action by a widow for the death of her husband. Deceased was a clerk of Pickford & Co. He was at his work in the Cheltenham goods shed. Three porters were ineffectually trying to turn a truck on a turntable, and deceased, seeing their difficulty, went to their aid. While giving his aid, an engine backing trucks down the siding forced the truck on the turntable against a wall and squeezed deceased, and from injuries received in this way he died. The case was tried at the Gloucester Summer Assizes, 1856, and the Jury found a verdict for the Plaintiff. The Company appealed, when Baron Bramwell delivered the Judgment—"The deceased voluntarily assisted some of the Company's servants in their work. Other of the Company's servants were guilty of negligence about their work, and by reason thereof the deceased was killed. The Company's servants were persons competent to do the work, and the Company did not authorise the negligence. We are of opinion that under these circumstances the action is not maintainable. The cases quoted show that if the deceased had been a servant of the Company, and injured under such circumstances, no action would be maintainable; and it might be enough for us to say

that those cases govern this, for it seems impossible to suppose that the deceased, by volunteering his services, could have any greater duties on the Company than would have existed if he had been a hired servant. Now it may be that had the mischief here arisen from the personal act of the master, he knowing that the deceased was there, the master would have been liable, and that, as the Company's servants knew the deceased was on the railway, they were guilty of wrong to him. But upon what reason or principle should the Company be liable? If a servant is driving his master in a carriage, and a person gets up behind, and the servant, knowing that, drives carelessly and injures that person, the servant may be liable; but why is the master to be responsible? In the case of a wilful act, intrinsically wrong, by a servant, the master is not liable. The master's liability ought to be limited to that which he may anticipate or guard against. It seems to us there can be no action except in respect of a duty infringed. No man by his own wrongful act can impose a duty. There was no negligence in the Company by their servants, and the Company is not guilty." Verdict for Company.—*Tried in the Court of Exchequer, Feb.* 21, 1857.—*From Law Journal, vol.* 26, *page* 171.

557. *Blackmore* v. *Bristol and Exeter Railway Company.* —Action for £250 by Jane Blackmore for the death of her husband, who was killed in steadying down a block of stone hanging on a crane; the chain gave way, and the beam of the crane struck him on the head, and he died of the injury. Three pieces of stone, weighing altogether about six tons, were sent to Weston Station, 1st December, 1856, at *station to station* rate, consigned to Harvey. Harvey, under the lower rate, was responsible to unload the stone. He brought his men to the station, and, finding the stones could not be unloaded without the aid of a crane, requested that the waggon should be shunted under the crane. This was done. Having lifted one of the stones two or three feet, they found more help necessary. The deceased was passing at the time, and was called to lend a hand, and he complied, when the accident occurred. Blackmore was neither in the service of the Company or Harvey. The chain of the crane, at the time to which the present action related, was in an

unsafe condition, to the knowledge of the Company. The case was tried at the Bristol Summer Assizes, 1857. The learned Judge was of opinion that the action could not be maintained, and the amount of damages having been left to the Judge, a non-suit was directed, with leave to move for a new trial. On the new trial Justice Coleridge delivered Judgment. He held that there was no duty with respect to the crane imposed on the Company by the contract between them as carriers and Harvey as consignee; that the only duty was that arising from the contract of loan between Harvey and the Defendants, to which Blackmore was no way privy, and therefore that no action could be maintained against the Company. The Judge remarked—"It is quite clear Blackmore came up to assist, in fact, at the request of one of the men employed by Harvey; this request being made in Harvey's presence, and the service rendered in Harvey's sight, he was, therefore, for the time being in Harvey's employ. As regards mileage rates (S. to S.), the crane was placed at the station in virtue of no contract with consignee or sender, but just as any other convenience, erected, and allowed to be used by the public, in order to induce people to send their goods by the railway."

The conclusions drawn from this case are—"The duties of gratuitous lender and borrower of a chattel are in some degree correlative. The loan must be taken to be for the purpose of a beneficial use by the borrower. The borrower is not responsible for reasonable wear and tear, but he is for negligence, for misuse, for gross want of skill in the use, and for anything which may be defined as legal fraud. The lender is responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him." Verdict for Company.—*Tried at the Court of Queen's Bench, Feb.* 23, 1858.—*From Law Journal Reports, vol.* 27, *page* 167.

558. *Manley* v. *St. Helens Canal and Railway Company.*—Action for personal injury. It appeared that before

the making of the St. Helens Canal the highway, which it intercepted, and which now led over the bridge when closed, had been an ancient public highway for passengers by horse and foot, and also for carriages, and that the traffic over it was now very considerable to and from St. Helens. On the St. Helens side there was no lamp, and on the other side a single one, which did not show sufficient light across the bridge. When the bridge was opened there was no protection to prevent passengers from walking right into the canal. On the night in question the deceased had crossed towards St. Helens, but almost immediately afterwards returned. In the interval the bridge had been opened by some boatmen to let their boat through, but it had not passed through, and the bridge remaining open the deceased walked to the edge of the canal and fell into the water. There was no evidence that the deceased, through inebriety or otherwise, had contributed to his death. His Lordship left it to the Jury whether the deceased fell into the water through the want of due care on the part of the Company, without fault on his own part. Verdict, £500 for the widow and £250 for a child.

On the appeal case Chief Baron Pollock held that where a canal company are empowered by Act of Parliament to intercept highways and to construct bridges to connect intercepted portions, and the canal and bridges are vested in them as proprietors, and they are enabled to take tolls from boats passing the bridges, and they erect certain bridges which the boatmen are entitled to open for the purpose of passing, and which, when open, leave the edge of the canal unprotected, and there is not sufficient light or other means of preventing accidents, and the consequence is that while the bridge is lawfully opened at night time a person falls into the canal, without any fault on his part, the Company will be liable to an action.

Semble—It would be otherwise if the boatmen, after having passed, had wrongfully left the bridge open at the time of the accident. Judgment against the Company affirmed.—*Tried in the Court of Exchequer, January* 19, 1858.—*From Law Journal Reports, vol.* 27, *page* 158.

559. *M'Carthy* v. *Young.*—Action for personal injury. A gratuitous lender of a chattel is not liable for a personal

injury sustained by the person to whom it is lent, or by any other person with his permission, received from the defective construction of the article, the lender not having notice of the defect, although guilty of negligence in its construction. In such a case it is immaterial that the person using the chattel was carrying out a contract entered into by the borrower with the lender.

The Defendant, a builder, having erected a scaffold for the purpose of pulling down and rebuilding his own house, subsequently agreed that "A." should pull down and remove a wall, and lent "A." the scaffold to assist in performing his contract. "A." employed the Plaintiff to take down the wall at so much a load, and the Plaintiff used the scaffold for that purpose. The scaffold fell and injured the Plaintiff, who was upon it. The Jury found that the accident arose from the defective construction of the scaffold, and that the Defendant was guilty of negligence. There was no proof that the Defendant had notice of the defect.

Held, on appeal, that the Defendant was not responsible for the injury. This is an important case where injury might result to the public from using cranes and other machinery provided by railway companies at their goods stations.—*Tried in Court of Exchequer, January* 11, 1861.—*From Law Times Reports, vol.* 30, *page* 227.

560. *Farrant* v. *Barnes.*—Action for personal injury by a carrier's carter, owing to a carboy containing nitric acid, which he was carrying on his back, bursting and injuring him. It was held that a person who sends an article of a dangerous nature to be carried by a carrier is bound to take reasonable care that its dangerous nature should be communicated to the carrier and his servants who have to carry it; and if he does not do so he is responsible for the probable consequences of such omission. Where, therefore, the Defendant caused a carboy containing nitric acid to be delivered to the Plaintiff, who was one of the servants of a carrier, in order that it might be carried by such carrier for the Defendant, and the Defendant did not take reasonable care to make the Plaintiff aware that the acid was dangerous, but only informed him that it was an

acid, and the Plaintiff was burnt and injured by reason of the carboy bursting whilst, in ignorance of its dangerous character, he was carrying it on his back from the carrier's cart, it was held that the Defendant was liable to the Plaintiff in an action for damages for such injury. Verdict for £50 for Plaintiff.—*Tried in Court of Common Pleas, January* 23, 1862.—*From Law Journal Reports, vol.* 31, *page* 137.

561. *Griffiths (Administratrix)* v. *London and North Western Railway Company.*—Action by a widow for compensation for the death of her husband. The deceased was a carter. He took some goods for his master to the Waterloo Station, Liverpool, and on unloading them from his lorry applied to the Company's man, Newsome, for a receipt. At the moment deceased spoke to Newsome the latter had his hand upon the jigger of a steam crane, and hanging from the crane was a bag of madder weighing between three and four hundredweight. Newsome made fast the jigger, leaving the bag suspended in the air about five feet, and went to deceased. Newsome having no ink in his pen, deceased offered to go to the hut and get him a dip. Several packages of goods were lying heaped about. Deceased took the pen and went over the packages (possibly in a straight line) to the hut, and was passing under the suspended bag when it slipped from the sling and crushed him so seriously that he died in a few minutes after reaching the hospital. There was another way to the hut free from obstruction. Plaintiff contended the sling was an improper one, and the Company were negligent in using it; that a "thimble sling" should have been used, which tightly grips and ties the package in the middle, or there should have been a sling with two loops, one to support either end of bag; that the bag being a hard, stiff package, the sling was unsuitable, while it would have been suitable for a soft or limp package, like a bag of flour, where the ends of the bag would hang down and so prevent the bag slipping through. The Company contended the sling in question was a proper one for the purpose, and witnesses swore such things had been in use for more than twenty years for similar packages without an accident. The case was first tried before Justice Lush, at

the Liverpool Spring Assizes, when the Judge left it to the Jury to say (1) whether the sling was a proper one, and whether the Company used it in the way in which they ought to have used it; (2) whether the deceased was himself contributory to the accident by going under the sling in the way in which he did. The Jury found a verdict for Plaintiff for £300, viz., £200 for the widow and £50 each for deceased's two children. The Judge reserved leave to the Company to move to enter a non-suit. On the appeal case Baron Martin said—"There is, in my judgment, no evidence of negligence here. Surely a railway company must be allowed to carry on its business on its own premises in such a way as it thinks fit. When the Company used this crane it was never thought that anyone would go under it; it was merely used in carrying out their own mode of doing their own business. Can crawling over heaps of packages and under cranes be a proper way? Using common sense, the deceased must have known that round behind the hut was the proper way. How can it be said there was any negligence? The deceased interrupted the servant of the Company in the discharge of his business, and thereupon he naturally stopped the working of the crane, and the package remained suspended in the air. He wanted a pen and ink for his own purposes and he went to get it, but instead of going the clear road he went under the suspended package, and the misfortune happened. If ever there was an accident that was one, and unless railway companies can be made insurers in every case where a man goes upon their premises, the Company are not responsible here." Baron Bramwell said—"If the Company had had reason to expect that people would pass under this crane, or had invited them by words or conduct in any way so to do, there would have been evidence of negligence, of which the suffering party might complain; but I see no evidence that they had any reason to expect that people would pass beneath it, or that they in any way invited or led them into the temptation of so doing. If that is so, I do not see how there can be said to have been any negligence in this case, because the Company had a right to use the most defective slings they liked, as far as the conduct of their own business was concerned, merely compensating the owners of goods for any injury done thereby

to such goods." Baron Channell concurred. Judgment for Company.—*Tried in Court of Exchequer, June* 2, 1866.—*From Law Times Reports, vol.* 14, *page* 797.

562. *Holmes* v. *North Eastern Railway.*—Action for £75 for personal injury at a coal shoot at East Cowton Station. It appeared all the cells under the elevated siding were filled, and there was no room to shoot a waggon of coal consigned to Plaintiff. Plaintiff came to the station with his cart, and wanted coal badly for his threshing machine. He told the station-master he would get on to the waggon of coal, and throw down some pieces of coal to his lad to put into the cart. To do this he had to walk along a flagged way made along the elevated siding, which was a customary pathway used by consignees when they helped the Company's servants to tip the coal out of the waggons down into the cells. After having thrown down sufficient coal to his lad, he stepped down on the flagged way. One of the flags was in an insecure state, and gave way, and the Plaintiff fell into a cell under the siding and was injured. The station-master made no objection to his going on to the waggon. The case was first tried before Baron Cleasby, at York, when the Jury found a verdict for £75, and the Company had leave to appeal on the ground that there was no evidence of negligence. On the appeal case Chief Baron Kelly said—"The flagged way was used by the Plaintiff for a purpose connected with the performance of the contract, and it appears to me that his going to effect the purpose, with the consent of the Company's station-master, in an unusual manner makes no kind of difference." Baron Bramwell said—"If the Plaintiff went up on the flagged way to get a view of something going on in a neighbouring field, he would have no right of action against the Company on the ground that the place was not safe. So, if a man went there for the first time on such an errand as this, I should think he had no claim. But it appears a great many people have been in the habit of going there for the purpose of assisting in tipping coals, and it came to be considered by every man to whom coals were consigned as a part of the contract with the Company that he should go there and assist in tipping them.

They are in the position of persons who, as it were, are told that they may safely do that which it is for the convenience, not only of themselves, but of the Company that they should do." Baron Channell and Baron Cleasby concurred, and Judgment was given against the Company.—*Tried in the Court of Exchequer, May* 28, 1869.—*From Law Journal Reports, vol.* 38, *page* 161. The Company appealed to the Exchequer Chamber, February 10, 1871, when the Judgment already given was affirmed.—*From Law Journal Reports, vol.* 40, *page* 121, *C.P.*

563. *Paddock* v. *North Eastern Railway Company.*—Action for personal injury. Plaintiff, an American, went to the Ripon Station on 26th November, between 5 p.m. and 6 p.m., to arrange to send on some show apparatus to Otley. A Company's foreman directed him to cross the line to the goods station. Plaintiff, going round a truck to do so, fell into a deep hole used for stowing coal, *i.e.*, engine ash-pit (?). He dislocated his shoulder and was otherwise severely injured. Baron Bramwell said upon the Plaintiff's own statement there was no case made out, and the Company were not liable. He was prepared to hold that there was no evidence of negligence on the part of the Company, as there was no duty cast upon them to light a portion of the line where there was no recognised footpath; and he also held that there was contributory negligence on the part of the Plaintiff in crossing the line in the dark where there was no recognised footpath, and was prepared to direct a verdict for the Company. Judgment for Company.—*Tried in Court of Exchequer, June* 19, 1867.—*From Law Times Reports, vol.* 16, *page* 639.

Plaintiff appealed to the Exchequer Chamber, when Justice Cockburn said—"Without expressing an opinion as to which way the verdict should be, we are all of opinion (Justices Willes, Blackburn, Keating, Mellor, M. Smith, and Lush) that there was a case here to go to the Jury. The exceptions to the ruling of the learned Judge at Nisi Prius must therefore be allowed, and a *venire de novo* be issued" (new trial).—*Tried in Exchequer Chamber, February* 8, 1868.—*From Law Times Reports, vol.* 18, *page* 60.

564. *Manchester Sheffield and Lincolnshire Railway Company* v. *Woodcock.*—Action for injury to a mare. The Plaintiff went to Barnsley Station with a cart and team by implied invitation to fetch lime from the Company's railway yard. While in the yard he unharnessed a mare that was leading his team. A passing train frightened the mare, and in spite of the Plaintiff's efforts to hold her, she backed some considerable distance, and fell over a dwarf wall of the Company's and was hurt. An action having been brought in the County Court by the Plaintiff against the Company for not having a sufficient fence to the yard, it was proved at the trial that the Plaintiff knew the place well and had been there often before. The County Court Judge found that the fence was insufficient, and decided in favour of the Plaintiff.

On appeal, it was held that there was no proof of want of reasonable care on the part of the Company to prevent damage from unusual danger to persons visiting the premises with full knowledge of the state of the place, and that, therefore, the Plaintiff was not entitled to recover. Judgment for Company. —*Tried in the Court of Queen's Bench, June* 22, 1871.—*From Law Times Reports, vol.* 25, *page* 335.

565. *King* v. *Great Western Railway Company.*—Action by a widow for death of her husband, resulting within twelve months from injuries received at Wallingford Station. King, Plaintiff's husband, was sent by his master to get a truck-load of stone from the station. He used a crane provided by the Company for unloading the stone. Owing to the crane being in bad order and badly adjusted, and the tackle therewith connected, King received injuries from which, within twelve months, he died. The Company contended that King, not having been a party to the contract of carriage, his widow could not sue upon it. Justice Willes, in giving Judgment, said—"In the present case the Company were common carriers, and in consideration of reward paid to them as such carriers by the consignees of the stone, they provided for them and their servants a crane and tackle, which were at the time in such bad order that they were dangerous to those who used them. It is clear that under such circumstances an action would lie at the suit

of the consignee if he had been injured by the crane. The question here is whether that right of action extends to the consignee's servant. I must say it would be a very remarkable thing, in the ordinary course of business between a carrier and a consignee, if the consignee could have an action in respect of the carrier's negligence, while the consignee's servant was without a remedy. The relation between master and servant is such that, where a contract is made with a third person for something to be done by the master, the master may either go himself and do it or take or send his servant to do it. In *Indermaur* v. *Dames* the Court had to consider the case of the servant going instead of the master to do the work on the Defendant's premises which the master had contracted to do, and it was held that the Defendant was liable to compensate that servant for injuries sustained by his (Defendant's) negligence while engaged on the work in question upon the Defendant's premises. If that is the rule in ordinary cases, it is especially so in the case of a common carrier." Justices Brett and Smith concurred. Judgment against Company.—*Tried in Court of Common Pleas, May* 11, 1871.—*From Law Times Reports, vol.* 24, *page* 583.

566. *Harrison* v. *North Eastern Railway Company.*—Action for personal injury. Plaintiff (mate of ship) was crossing some railway sidings at the Albert Dock, Hull, when he was knocked down and injured by an engine shunting some empty waggons at a speed of four miles an hour. The case was first tried before Baron Pollock, at the Leeds Summer Assizes, 1873, when Plaintiff was non-suited. He then appealed to the Court of Exchequer, when Baron Bramwell held that there was no evidence of negligence to go before a Jury. Judgment for Company.—*Tried in Court of Exchequer, Jan.* 19, 1874.—*From Law Times Reports, vol.* 29, *page* 845.

567. *Wright* v. *London and North Western Railway Company.*—Action for personal injury. Plaintiff booked a heifer to go to Penrith, which was sent in a horse-box, and Plaintiff travelled by the same train. At Penrith the box was detached from the train, and had to be shunted into the landing place. There was but one porter there, and Plaintiff, with

the *acquiescence* of the station-master, assisted in pushing the horse-box on the railway. It was proved that it was a usual thing for the owners of cattle to assist in this way at this station. During the process of pushing the horse-box a train came into the station, and the Plaintiff was struck and severely injured. The case was first tried at Carlisle Summer Assizes, 1874, before Baron Pollock, when the Jury gave Plaintiff £1,629 2s. Leave to appeal was given on the ground that there was no evidence of negligence to go to the Jury.

On the appeal case Chief Justice Cockburn said—"I am of opinion that there was evidence to go to the Jury, and that the Plaintiff received an authority from the station-master to go to the place where he was. Under these circumstances he cannot be considered a mere volunteer (at his own risk); but the Company had a duty towards him which they have not performed, and for breach of which they are liable." Justice Field said—"The station-master is agent for the Company to deliver goods, and if he assented to some other mode of delivery than the usual one he would bind the Company thereby. I think that there is evidence of such assent in this case, and therefore the Defendants are liable for the injury which happened to the Plaintiff through their negligence." Judgment against Company.—*Tried in Court of Queen's Bench, May* 3, 1875.—*From Law Journal Reports, vol.* 44, *page* 119.

The Company carried the case to the Court of Appeal, when Chief Justice Lord Coleridge said the Judgment must be affirmed, holding that Plaintiff went to assist in shunting the truck under a license which was given for the purpose of enabling the Company to discharge a duty which they owed to him. Lords Justices James, Mellish, and Baggally, and Baron Cleasby concurred. Judgment against Company.—*Tried in Court of Appeal, January* 17, 1876.—*From Law Journal Reports, vol.* 45, *page* 570.

PERSONAL INJURY TO PASSENGERS IN CONNECTION WITH CARRIAGE DOORS.

	Case No.		Case No.
Richardson v. *Met.* (1869)... ...	568	*Richards* v. *Great Eastern* (1873)	573
Fordham v. *L. B. & S. C.* (1869)	569	*Gee* v. *Metropolitan* (1873) ...	574
Adams v. *L. & Y.* (1869)	570	*Jackson* v. *Metropolitan* (1877)...	575
Warburton v. *Midland* (1870) ...	571	*Maddox* v. *L. C. & D.* 1878) ...	576
Murray v. *Met. Dist.* (1873) ...	572	*Self* v *L. B. & S. C.* (1880)... ...	577

568. *Richardson* v. *Metropolitan Railway Company.*—Action for personal injury. Plaintiff, a passenger, having got into a carriage, left his hand on the door jamb of the carriage for about half a minute. The guard called out to the passengers to take their seats, and he then went along the train and shut the carriage doors, and not seeing the Plaintiff's thumb, he injured it by shutting the door. On the first trial a verdict was given for Plaintiff, with leave to the Company to move to enter a non-suit on the ground that there was no evidence of negligence by the Company, and that there was evidence of contributory negligence on the part of Plaintiff.

Justice Montague Smith, on the appeal case, said—"I think there was no evidence of negligence on the part of the Company. The door was shut in the ordinary way after calling out by the guard, and there was strong evidence of contributory negligence, and that the accident was due to the Plaintiff's own carelessness. If a passenger will put his hand in a dangerous place, and the door is shut in the ordinary way, he must take the consequence." Chief Justice Bovill and Justice Byles concurred. Judgment for Company.—*Tried in Court of Common Pleas, June* 11, 1868.—*From Law Journal Reports, vol.* 37, *page* 300.

569. *Fordham* v. *London Brighton and South Coast Railway Company.*—Action for £25 for personal injury, the Plaintiff's hand being jammed in carriage door. Plaintiff was a third class passenger, Sydenham to Norwood Junction, 1st September, 1867. When Plaintiff came up, the train was standing at the platform and the carriage doors open. Plaintiff had a parcel in his right hand, and when entering the

carriage put his left hand on the door-post. The guard, without warning, and before Plaintiff had got in, shut the door upon the back of Plaintiff, whereby Plaintiff was shoved on to the lap of another passenger, and retaining the hold of his left hand on the door-post, it became jammed in the door. The case was first tried by Justice Byles, at the Middlesex Sittings, 1867, when the Jury found there was negligence on the part of the Company's servants, and that the Plaintiff had not contributed to the accident by any negligence on his part, and gave Plaintiff a verdict for £25.

On the appeal case Chief Baron Kelly said—"We think the Judgment of the Court of Common Pleas must be affirmed. In the first place, there was evidence of negligence on the part of the Company. The Plaintiff was getting into the carriage when the guard came and closed the door, and pushed him into the carriage. Supposing the time to have arrived for shutting the door, the guard ought to have first called out 'Take your seats,' but instead of doing so, or giving any warning, he came in the dark and banged to the door. We do not say that there was not a strong case of contributory negligence, for Plaintiff seems to have acted without caution, and having a parcel in one hand he put the other into the jamb of the doorway. But we must take the whole of the evidence together. It is dark, and the man, who is getting into the carriage perhaps only just before the train is starting, and when he cannot be expected to see exactly where to put his hand in safety, puts it where he did for the minute. I do not say that that was not a case of contributory negligence for the Jury, but we are called upon to say that it was such clear evidence of negligence that the learned Judge ought to have stopped the case from going to the Jury. We think it was not." Judgment against Company.—*Tried in Exchequer Chamber, June* 18, 1869.—*From Law Journal Reports, vol.* 38, *page* 324.

570. *Adams* v. *Lancashire and Yorkshire Railway Company.*—Action for personal injury. Plaintiff was a third class passenger, Waterloo (Lancashire) to Liverpool. When he had proceeded a short distance the door of the carriage flew

open, and Plaintiff closed it; it flew open twice again, and Plaintiff closed it. After starting from Marsh Lane Station the door flew open again, and Plaintiff, in attempting to again fasten it, put a little of his weight on the door, and, either from a jerk or otherwise, the door gave way, and he was thrown out of the carriage and injured. In three minutes the train would have reached Sandhills Station, and five minutes more reached Liverpool. The case was first tried in Liverpool, and the Jury found for the Plaintiff, and leave was given the Company to appeal on the ground that there was no evidence of liability.

On the appeal case Justice Byles said—"I am of opinion our Judgment must be for the Company. There was evidence of negligence of the Company in not having a proper fastening, and but for the negligence of the Company there would have been no accident. But still their negligence was not the immediate or effectual cause of the accident, and it was the negligence of the Plaintiff in attempting to shut the door, and putting at least some of his weight on the door while the train was in motion, which was the approximate cause. Did, then, the Company's neglect necessitate the Plaintiff's act, or was there an alternative course for him to adopt? He might have changed his seat next the door, or held the door as he had done before, and that he had by previous trials experienced the difficulty as to shutting the door. These alternatives were not dangerous or inconvenient; and, as the alternatives were of no serious inconvenience, he had no right to run the risk incurred by putting his weight on the door, and the Company were not liable for the consequences entailed by his act." Judgment for Company.—*Tried in Court of Common Pleas, June* 18, 1869.—*From Law Journal Reports, vol.* 38, *page* 277.

571. *Warburton* v. *Midland Railway Company.*—Action for £500 for falling out of a train in motion. Plaintiff sat on the edge of the seat, with her right elbow on the window of the carriage and her left hand on the door. She was looking out of the window of the door. The door was not fastened, and she fell out. Justice Blackburn said—"I think the Company ought to take reasonable care to see the handles of the carriage doors are fastened; and if they neglect that, they are

guilty of negligence. But I think that a passenger ought not to lean upon the door too much; doors are not meant to be leant upon. It is for the Jury to say whether the Plaintiff leant too heavily upon the door. If so, she might be guilty of contributory negligence, which would disentitle her to recover." Verdict against Company for £500.—*Tried in Court of Queen's Bench, Feb.* 7, 1870.—*From Law Times Reports, vol.* 21, *page* 835.

572. *Murray* v. *Metropolitan District Railway Company.*—Action for personal injury. Plaintiff was a passenger from West Brompton to Charing Cross. As the train approached Charing Cross the brake was suddenly put on. Plaintiff allowed his left hand to rest on the ledge of the window, and the vibration of the brake on the train is supposed to have caused the window to fall down, causing a serious injury to Plaintiff's finger. On the first trial the Judge directed a non-suit, with leave to appeal.

On the appeal case Chief Baron Kelly said—"It is always with great reluctance we decide to withdraw these cases from a Jury; but there is here no doubt that the Plaintiff has failed to make out a *primâ facie* case. It appears from the facts that the window fell down either from defective construction or from having been put up by a passenger and insufficiently fastened. It was for the Plaintiff to give evidence that the falling of the window was from defective construction, but he did not give such evidence. The accident happened at nine o'clock in the evening, and there may have been forty previous journeys. There is no evidence of negligence, unless it be contended that the Company are bound to examine each window of each carriage before each journey." The other Judges concurred. Judgment for Company.—*Tried in the Court of Exchequer, January* 14, 1873.—*From Law Times Reports, vol.* 27, *page* 762.

573. *Richards* v. *Great Eastern Railway Company.*—Action for personal injury. In this case the only evidence adduced to support the charge of negligence was that of the injured person. She stated she was travelling with her child, and that she was seated on one side of the carriage and her

child on the other side. On arriving at the station at which she intended to get out, after the train had stopped, she rose from her seat, took her child in her arms, intending to sit down where the child had been sitting until the porter should open the door. In doing so she touched the door, which flew open, and she fell out and was injured. It was held all these facts were evidence of negligence on the part of the Railway Company proper for the consideration of the Jury, and Chief Baron Kelly said—"The account given by the Plaintiff of the accident is not very clear, and it is not easy to see how it could have happened in the manner in which she states. She says, however, that in doing something which she had a perfect right to do she touched the door and it fell out. If by 'touched' we suppose her to mean 'leaned with some degree more or less of force,' the event is possible, and so far the case is made out. It is said that she described a physical impossibility, but that is a question for the Jury. There was clearly evidence for their consideration." Judgment against the Company.—*Tried in the Court of Exchequer, May* 7, 1873.—*From Law Times Reports, vol.* 28, *page* 711.

574. *Gee* v. *Metropolitan Railway Company.*—Action for personal injury. Plaintiff was a second class passenger from Victoria Station to Aldersgate. The Plaintiff was travelling with his brother, and the conversation turned on the system of signalling on the line. As the train was approaching Sloane Street Station, Plaintiff stood up and put his hand on the iron cross bar of the off-side door, and leant forward with the intention of seeing the signal lights of the station. The door flew open, and he fell out on the railway and was injured. The Company contended there was no evidence to go to the Jury, but the Judge allowed the case to go to the Jury. The Company tendered no evidence, and the verdict was for Plaintiff, £250 damages. Leave to appeal was given the Company. This first trial was at the Middlesex Sittings, 1871, before Chief Justice Cockburn.

The appeal was made to the Court of Queen's Bench, and the Judgment there affirmed. The Company then further appealed to the Court of Exchequer Chamber, when Chief

Baron Kelly said—"I am of opinion the Judgment must be affirmed. I think that any passenger in a railway carriage who rises for the purpose of looking out of the window, or for some lawful purpose, and brings his body into contact with the door has a right to assume, and is justified in assuming, the door is properly fastened; and if, by reason of the door being improperly fastened, the act which he does causes the door to fly open, any accident which is caused thereby is owing to the omission on the part of the Company. Thinking, therefore, that there was evidence, first, of negligence by having the door unfastened, and secondly, that it was by reason of that negligence that the Plaintiff, in doing that which every passenger has a right to do—attempting to look out of the window—was injured, I hold that the Court below were right in their Judgment against the Company, and that Judgment must be affirmed." Baron Martin, Justice Keating, Justice Brett, Baron Cleasby, and Justice Grove concurred. Judgment accordingly against Company.—*Tried in Court of Exchequer Chamber, Feb.* 3, 1873.—*From Law Journal Reports, vol.* 42, *page* 105.

575. *Jackson* v. *Metropolitan Railway Company.*—Action for personal injury. Plaintiff was a third class passenger, Moorgate Street to Westbourne Park. At Gower Street, the carriage then being full, three passengers entered and stood up. No complaint was made to the Company's servants. At Portland Road there was a rush of several persons to enter the carriage, and one opened the door; Plaintiff partly rose from his seat, and held up his hand to prevent any more passengers coming in. The train commenced to move; a porter pushed aside the persons, and slammed the door. The motion of the train threw Plaintiff forward, and he put his hand upon one of the hinges of the door at the moment it was slammed, and his thumb was caught and injured. The case was first tried before Justice Brett and a Special Jury, December 3, 1873, when the Judge ruled there *was evidence of negligence to be submitted to the Jury.* The Jury found £50 damages for Plaintiff. A rule was obtained, the ground being that there was no evidence of negligence proper to be left to the Jury. The rule was discharged, which

amounted to the verdict being affirmed. The Company then went to the Court of Appeal, when two Judges were in favour of Plaintiff and two against; hence the verdict was again virtually affirmed. The Company then appealed to the House of Lords. The Lord Chancellor (Cairns) said—"The question is—Was there at the trial any evidence of this negligence which ought to have been left to the Jury? A Judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the Jury has to say whether from those facts, when submitted to them, negligence ought to be inferred. If Juries were at liberty to hold that negligence might be inferred from any state of facts whatever, they might exercise it in an arbitrary manner. Take instances of actions against railway companies. A company might be unpopular, unpunctual and irregular in its service, badly equipped as to its staff, unaccommodating to the public, notorious perhaps for accidents; and in case of an accident a Jury, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where the company was really blameless. In the present case I am bound to say that I do not find any evidence from which, in my opinion, negligence might reasonably be inferred. The negligence must in some way connect itself or be connected by evidence with the accident. There was, no doubt, negligence on the Company in allowing more passengers than the proper number to get in at the Gower Street Station; and it may also have been negligence, if they saw these supernumerary passengers, or if they ought to have seen them, at the Portland Road Station, not to have removed them; but there is nothing, in my opinion, in this negligence which connects itself with the accident. If the overcrowding made Plaintiff less a master of his actions when he stood up or when he fell forward, this ought to have been made matter of evidence, but no evidence of the kind was given. As regards what occurred at Portland Road, I am equally unable to see any evidence of negligence connected with the accident, or, indeed, of any negligence whatever. The Company cannot, in my opinion, be bound to prevent intending passengers on the platform opening a carriage door with a

view of looking or getting into the carriage. They are bound to have a staff which would be able to prevent such persons getting in where the carriage was already full, and this staff they had, for the case finds that the porter pushed away the persons who were attempting to get in. As the train was on the point of passing into a tunnel, the porter could not shut the door otherwise than quickly, or, in this sense, violently. I am of opinion our Judgment should be for the Company."

Lord O'Hagan concurred, and said—"I agree with the Lord Chancellor that the authority of *Bridge's Case* (30 L.T., 844) does not affect and cannot govern this case. I am unable to come to the conclusion that the facts establish negligence against the Company. The Plaintiff does not rely upon any single act in proof of negligence. A series of events is taken consecutively, and from the whole it is argued that the Jury had ground for inferring it. I am not prepared to say that if the overcrowding had been connected with the accident as in any way its cause, the Company might not have been liable. *Ex concessis* the overcrowding *per se* would have given the Plaintiff no ground for this action, and the subsequent events do not appear to me to make it more effective for that purpose. Railways are potent monopolies comparatively little subject to the various forms of control which law and opinion exercise upon individuals, and but for the action of Juries in preventing negligence and disregard of the general comfort and safety, the want of that control would be a great mischief to society. The porter in shutting the door did what was right and reasonable, and if he had failed to do it and evil had resulted from the swinging of the open door in the tunnel, there would have been real ground for making his employers answerable in damages. The same occurrence, with the same result, might have taken place if the proper number of passengers had been in the carriage. The opening of the door, the intervention of the porter, the quick slamming—all might have occurred in exactly the same way if the intruders had never entered or had been removed. I think your Lordships will be safe in adopting the view of Lord Justice Bramwell, who said—'Supposing the evidence to be consistent with negligence, namely, that negligence may have

caused the matters complained of, it is equally consistent with no negligence, namely, that the matters proved may have been caused otherwise than by negligence; and it is an elementary rule that, when the evidence is consistent as much with one state of facts as with another, it proves neither.'" Lords Blackburn and Gordon concurred. Judgment for Company, reversing the decisions of the Courts below.—*Tried in House of Lords, November* 15 *and December* 13, 1877.—*From Law Times Reports, vol.* 37, *page* 679.—*Trial in the Common Pleas is reported in Law Journal Reports, vol.* 44, *page* 83.

576. *Maddox* v. *London Chatham and Dover Railway Company.*—Action for £20 for a crushed thumb, by a carriage door being shut at Snow Hill Station, London. The case was first tried in the Lord Mayor's Court, and the Jury awarded £20. The Company appealed, when Justice Lindley said—"It is obviously difficult to decide between facts amounting to negligence and facts amounting to accident. The Plaintiff was getting into the carriage; he had, in fact, completely got in, but not so completely as to have taken his seat. He had not got in in the sense of having come to a standstill, but was in the act of taking his seat. Now this is the difficulty. What is there to show that there was any danger apparent to the porter who shut the door? There is no evidence that there was any danger seen by him, or that he would have seen any danger if he had taken more care than he did take. We cannot say at a guess that he would have done so. The only point was the absence of any warning by the railway servant before the door was shut. But there is no rule of law that the porter is bound to give warning, or that any particular caution should be taken in any case. I think the Judgment must be for the Company." Justice Grove said—"The Plaintiff's thumb was by some means in the hinge of the door, and was injured. How it got into that position we do not know, or why it was behind him, as it must have been, more or less; but it is plain that it was not by the negligence of the guard who shut the door. I think there was not sufficient reasonable evidence of negligence to leave to the Jury, and that the Judgment must be for the Company." Justice Lopes concurred. Judgment for Company.

—*Tried in Court of Common Pleas, February* 1, 1878.—*From Law Times Reports, vol.* 38, *page* 458.

577. *Self* v. *London Brighton and South Coast Railway Company.*—Action for personal injury at Peckham Rye Station, owing to a porter slamming a carriage door and injuring Plaintiff. The Plaintiff was booked at Snow Hill Station by the London Chatham and Dover Company, and Peckham Rye belongs to the London Brighton and South Coast Railway Company, whose porter caused the injury. Plaintiff sued the London and Brighton Company. The case was first tried before Chief Baron Kelly and a Jury. The Brighton Company receive 80 per cent. of the profits arising from the traffic over the line, and the platform at which the accident occurred is exclusively allotted to the Chatham and Dover Company. Chief Baron Kelly gave Judgment in favour of the Company on the ground that, on the true construction of the Act of Parliament, the porter whose negligence caused the injury was not the servant of the Brighton Company. The case was referred to the Court of Appeal, when Lord Justice Baggallay said—"The porter was guilty of negligence, and, in my opinion, by the Act he was the servant of the Brighton Company. *Primâ facie*, therefore, the Brighton Company are liable, and, for the reasons which Lord Coleridge has expressed, I think the burden of liability is not shifted by anything in the Act or in the arrangement between the Companies. I think it is immaterial whether the porter was doing duty for the Chatham Company. As to the liability of the Chatham Company I do not express any opinion." Lord Coleridge concurred. Judgment against Company.—*Tried in Court of Appeal, March* 5, 1880.—*From Law Times Reports, vol.* 42, *page* 173.

Personal Injury to Cattle Drovers and other Persons when Travelling on Free Passes.

	Case No.		Case No.
Collett v. *L. & N. W.* (1851) ...	578	*Gallin* v. *L. & N. W.* (1875) ...	582
Harrison v. *G. N.* (1854)	579	*Hall* v. *North Eastern* (1875) ...	583
M'Cawley v. *Furness* (1872) ...	580	*Duff* v. *Great Northern* (1879) ...	581

578. *Collett* v. *London and North Western Railway Company.*—Action for personal injury by a travelling Post Office clerk, said injury being caused by a railway accident. The Company contended there was no contract between them and Plaintiff. The contract was between the Postmaster-General and Plaintiff, and the Company were not therefore liable. Chief Justice Lord Campbell said—"The allegation in the declaration is that it was the duty of the Company 'to use due and proper care and skill in and about the carrying and conveying of the Plaintiff,' and this is made out in point of law. That duty does not arise from any contract with the Plaintiff, but from the obligation imposed by the Legislature upon the Company to carry the mail bags and the officers of the Post Office in charge of the letters; and if it be the duty of the Company to carry the Plaintiff at all, it must be their duty in doing so to use reasonable care and skill. It cannot be said that it is enough for the Company to bring the dead body to the end of the journey. The Plaintiff is entitled to maintain an action for the injury he has sustained."—*Tried in Court of Queen's Bench, May* 6, 1851.—*From Law Journal Reports, vol.* 20, *page* 411.

579. *Harrison* v. *Great Northern Railway Company.*—Action for a broken leg, alleged to have been caused by the Company's negligence. Plaintiff was a reporter of *Bell's Life in London*, travelling on a free pass; but the pass was not in his name, but in the name of the chief reporter. The Company contended Plaintiff was unlawfully in the carriage, and that they were not liable; also, that there was a printed notice on the ticket restricting its use to the person in whose favour it was made out. The case was first tried before Baron Martin,

and he held there was evidence for the Jury, who gave a verdict for the Plaintiff, £400 damages. The Company appealed to the Exchequer Chamber, and on the appeal case Justice Coleridge said—"We are of opinion the ruling of the Judge was right. We think the question does not arise on the point as to the lawfulness of the Plaintiff being in the carriage, or, if it does, it is clear the Plaintiff was there lawfully, as, between the Plaintiff and Defendants, the point is whether or not the Plaintiff was in the carriage as a trespasser. Now, upon the issue so stated, we think the pass (conditions) not so clear as to make the other circumstances immaterial. The Company might issue tickets in a form which prohibited others from using them as not transferable. There was evidence for the Jury as to the irregular use of tickets, however worded, with the knowledge and permission of the superintendents of the station, who are placed there to regulate such matters. This would be such license as would make it wrong to say the Plaintiff was a trespasser in the carriage. If Plaintiff only made himself liable to the payment of a fare, he could not be considered a trespasser. But without entering on these considerations, as to which the facts fail, it appears to us there was something for the Jury; and that is all we need hold in order to decide that the Judgment should be, as we think it ought to be, affirmed." Judgment against Company.—*Tried in the Exchequer Chamber, July* 3, 1854.—*From Law Journal Reports, vol.* 23, *page* 308; *also Hurlstone and Gordon's Reports, vol.* 10, *page* 367.

(From this decision it would seem that a free pass should bear a notice on it that a person unlawfully using it would be liable to be fined 40s., same as a person riding without a ticket.)

580. *M'Cawley* v. *Furness Railway Company.*—Action for personal injury, the Company having contracted to carry Plaintiff safely to Carlisle. The Plaintiff contended the injury had arisen through gross and wilful negligence of Company. The Company contended the Plaintiff travelled under a free pass as the drover accompanying certain cattle, and that one of the terms of the pass was that he should travel at his own

risk; that the acceptance of the pass covered all negligence of the Company's servants, whether gross, culpable, or wilful. The Plaintiff contended it did not include "wilful negligence." The Lord Chief Justice said the Plaintiff had agreed to be carried at his own risk; this included any kind of negligence, and the Plaintiff could not recover. Justice Blackburn concurred. The condition did not, he considered, relieve the Company or their servants from criminal liability for negligence resulting in the death of a passenger, but so far as the passenger himself and his own right of action were concerned, he took all the risks, and one of the risks was negligence. It was difficult to say what was meant by "wilful" negligence, but the condition covered any liability for negligence. Justice Mellor concurred. Justice Quain concurred, saying the Plaintiff was carried at his own risk. Wilful negligence he confessed he did not understand as distinguished from gross negligence, *especially as a master was not liable for the wilful acts of his servants.* The condition, however, protected the Company from liability for any negligence. Judgment for Company.—*Tried in Court of Queen's Bench, November* 15, 1872.—*From Law Times, vol.* 54, *page* 59.

581. *Duff* v. *Great Northern Railway Company.*—Action for £400 by a drover, travelling on a drover's free ticket with cattle, Dundalk to St. Ives, and who was injured owing to an accident. The case was first tried at Dundalk Summer Assizes, 1878, when the Jury gave a verdict for £400, with leave to appeal. The appeal case was tried in the Exchequer Division (Dublin), when Chief Baron Palles gave Judgment in favour of the Company. One of the conditions of carriage was—

"As a drover is allowed to attend the cattle during transit, they (the Company) will allow such drover to travel free of charge, upon condition that he so travel at his own risk."

Barons Dowse and Fitzgerald concurred. Judgment for Company.—*Tried in Court of Exchequer (Dublin), November* 13 *and* 14, 1878, *and February* 19, 1879.—*From Law Times Reports, vol.* 41, *page* 197.

582. *Gallin* v. *London and North Western Railway Company.*—Action for personal injury. Plaintiff, a drover, travelled with his cattle to Garstang, near Preston, and reached Garstang in the middle of the night. He got out of the guard's van and went towards the station. The train began to move, and Plaintiff, feeling with his foot in the dark a small parapet, thought it was the platform. To avoid the train he put his foot on it. The parapet was a very low one, on a bridge over the Calder river, into which the Plaintiff fell, and was much injured by the fall. He had no free ticket, but admitted he was travelling free as a drover in charge of cattle. The case was first tried at Liverpool Spring Assizes, 1874, before Baron Amphlett, when the Jury gave Plaintiff a verdict for £325, finding that there was negligence on the part of the Company. The Company appealed, and on the appeal case Justice Mellor said—"I am of opinion our Judgment must be for the Company. I cannot help thinking that the word 'travel' must include, as in *Hodgman* v. *West Midland Railway Company*, all the incidents connected with the journey till the transit is at an end and the object of the journey accomplished. I think all those risks which result or arise during that transit until it is actually at an end certainly are intended to be guarded and are effectually guarded against by the words 'travel at his own risk.'" Justices Blackburn and Lush concurred. Judgment for Company.—*Tried in Court of Queen's Bench, February* 3, 1875.—*From Law Journal Reports, vol.* 44, *page* 89.

583. *Hall* v. *North Eastern Railway Company.*—Action for personal injury. Plaintiff was a drover, travelling with cattle from Angerton (North British Railway) to Newcastle (North Eastern). He obtained a drover's free pass for the through journey. The North Eastern Company's junction is Morpeth, and shortly after passing Morpeth a goods train of the North Eastern Company ran into the North British train and caused the personal injury. Plaintiff had not signed the counterpart of the drover's ticket. The Court held that the North Eastern Company were free from liability to the Plaintiff by reason of the through contract made with North British Company, and that the Plaintiff could not recover from the

North Eastern Company. Judgment for Company.—*Tried in the Court of Queen's Bench, June* 18, 1875.—*From Law Journal Reports, vol.* 44, *page* 164.

PERSONAL INJURY TO PASSENGERS FROM ACCIDENTS TO TRAINS ARISING FROM DEFECTS IN WHEELS, TIRES, CRANK PINS, &C.

	Case No.		Case No.
Stokes v. *Eastern Counties* (1860)	584	*Burn* v. *C. & B.* (1863)	587
Lee v. *C. & B.* (1862)	585	*Readhead* v. *North Midland* (1867)	588
Dawson v. *M. S. & L.* (1862) ...	586	*Phelps* v. *Great Eastern* (1869)...	589

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584. *Stokes* v. *Eastern Counties Railway Company.*—Action by the representatives of a gentleman of property who had been killed while a passenger in one of the Company's trains, from alleged carelessness and negligence of the Company in managing and conducting the engine. The accident arose from the breaking of the tire of the near leading wheel of the engine, caused by a transverse flaw in the *welding.* It was suggested the tire had been worn down too thin. The accident occurred 26th February, and the last time the tire was "turned" was in October, and the wheel had ran constantly since. The trial lasted six days. Chief Justice Cockburn, in summing up, said—"The question is whether the breaking of the tire resulted from negligence. The Company did not make the iron, and it is not said they are responsible unless the flaw had become, in the course of use and time, *visible.* Of this the evidence is speculative. You must deal with the case as *practical* men. It is one thing for the microscopic eye of science, with the aid of instruments and measurements, to detect inequalities or pick out flaws; but the practical working of railway business is quite another thing, and you cannot expect that a railway company shall be from time to time measuring with accurate scientific instruments, or taking down scientific persons to see if there is a little inequality here or there. The business of railways and of life could not go on if this were required. You must judge if the indications were such as a competent railway servant should and ought to have seen. If you are of opinion that the Company welded the tire,

and that there was negligence in the welding, then, as the defect in the weld was the cause of the accident, you can trace it clearly and connect it with the negligence of the Company. If they are not responsible for the *existence* of the flaw, then comes the question whether it was *visible*. The evidence that it was *not* so is *positive*, as the men who had charge of the engine examined it the night before the morning of the accident. If you are of opinion the flaw had become visible by an *ordinary*, *reasonable*, *proper*, and careful examination, and was not discovered, then there is negligence. But unless you are satisfied that the flaw was capable of being detected on such proper examination, you cannot hold the Company liable. Assuming the flaw was *not* visible, was there negligence in using the tire after it had been so reduced in substance? The evidence that the tire had been reduced to an unsafe thinness was rather scientific and speculative, while the evidence that it was not so was rather practical. If you think there was a degree of thinness that made it improper to use the tire, then you will find for the Plaintiffs. Might the accident have been prevented or mitigated by a better use of brake power? Was the absence of a second brake van, or the not putting the single one in the rear, negligence? But then the question would remain whether it conduced to the accident, *i.e.*, in the sense not of having caused it, but of not having prevented it." The Jury found (1) there was no evidence the tire was negligently welded; (2) that the neglect had not become visible; (3) that there was no negligence in using the tire after it had become thin; (4) that there was no negligence in not providing better brake power. Verdict for Company.—*Tried in Queen's Bench, Michaelmas Term*, 1860.—*Foster and Finlason's Reports, vol.* 2, *page* 691.

585. *Lee* v. *Cork and Bandon Railway Company.*—Action by a cattle dealer, a third class passenger, who claimed £200 for being wounded and injured in an accident between Cork and Bandon. Six miles from Cork, on a gradient and curve, the crank pin on the left leading wheel of the engine snapped, the connecting rod fell down, stuck in the ballast, rooted up rails and sleepers, and threw four carriages off line. Plaintiff

was thrown on the floor of carriage, but soon after walked back to Cork. It was proved by a working engineer from Sharp Brothers, the engine makers, there was a flaw in the centre of the pin from the parts not having cohered in the manufacture of the iron, which was the best Lowmoor. The Jury found that there was no want of care on the part of the Company nor in the manufacture of the pin; that the engine had been duly examined, *but the Company had made no special examination of the crank pin;* that there was no necessity for such examination; that such would not have detected the flaw, of which the Company had no notice. The verdict was entered for Company. Plaintiff's counsel insisted the verdict should have been for him, because no special examination had been made of pin. The Chief Baron reserved the point; and, in case of its being decided for him, the Jury assessed the damages at £40, and 3s., the price of the ticket.—*Tried before Chief Baron Pigott and Special Jury, June* 28 *and* 30, 1862.—*From Irish Clearing House Reports.*

586. *Dawson* v. *Manchester Sheffield and Lincolnshire Railway Company.*—Action for £200 compensation for personal injury—a contused shoulder and blow on the head. The quick train from Manchester to London ran off the line near Sheffield. The fore axle of the engine was found broken close to the boss, and there was no patent or visible flaw in the axle. The case was first tried at Liverpool Assizes, before Justice Crompton, when Plaintiff got a verdict for £200. The Company appealed, when Chief Baron Pollock said—"We have held, where an accident happens, as in this case, to a passenger in a carriage on a line of railway, either by the carriage breaking down or running off the rails, that it is *primâ facie* evidence for the Jury of negligence on the part of the Company. There was such *primâ facie* evidence of negligence here, and it was not rebutted by any evidence on the part of the Company." Judgment against the Company.—*Tried in Court of Exchequer, Jan.* 15, 1862.—*From Law Times, vol.* 5, *page* 682.

587. *Burn* v. *Cork and Bandon Railway Company.*—Action arising from an accident caused by fracture in a crank pin of one of the leading wheels of the engine. The Company contended the fracture was occasioned by an original defect in

the material and construction of the said crank pin, and in the inside or centre thereof, which said defect, before the fracture occurred, was not capable of being detected by the Company upon due and proper observation; that the Company purchased the engine in due course of business from competent manufacturers; and that the engine, before running on the day in question, was duly inspected. Chief Justice Pigott said—"The Company is bound to provide a roadworthy vehicle, and is answerable for all the consequences resulting from its not being so at the commencement of the journey. The question is whether the Company have stated facts sufficient to exempt them from the consequences of the rule of law so propounded. I am of opinion they have not. Their plea admits that at the time of the commencement of the journey their engine was defective in construction, and that the breach of contract was caused by that defect. According to *Sharp* v. *Grey* (9 Bing., 457; s.c., 12 Moo. & S., 62), that is no valid reason for not performing their contract. Have they shown in their plea that as far as human care and foresight could go they provided for the safety of their passengers? I think they have not. Their plea does not contain any averment as to the care or skill applied to the manufacture of the engine, or as to the care or skill exercised by them in the selection or inspection of it. All the averments in their pleas are quite consistent with gross and culpable negligence on their part in the purchase of it from the manufacturers. If they had been themselves the manufacturers of the engine, they would have been bound to aver and to prove that due care and skill had been exercised in the process of its manufacture. Are they to be relieved from local liability because they allege that they have purchased it from a competent manufacturer? I think that would be a distinction dangerous to the public, and that, as Baron Alderson says, 'railway companies might buy ill-constructed or unsafe vehicles, and the public be without remedy.'" Verdict against Company.—*Tried in Court of Exchequer, Dublin, Nov.* 10, 1863.—*From Irish Common Law Reports, vol.* 13, *page* 543.

588. *Readhead* v. *North Midland Railway Company.*—Action for injury to a passenger through the breaking down of

a carriage. The wheel tire broke through a latent flaw in the welding. From an air bubble in the welding it was of less real thickness and strength than it ought to have been; the flaw was not detected by the usual tests, and was one the manufacturer even could not have discovered, still less the Company's servants. Mr. Justice Lush, who tried the case at Durham, directed the Jury that, if they believed the evidence, the Company were not responsible, *as they were only liable for negligence*, which on this evidence was disproved. A verdict was given for the Company. An appeal was made on the ground of misdirection, and that the Company were liable on an *implied warranty* that the carriage was safe and secure. Plaintiff relied upon *Sharp* v. *Grey* (9 Bingham's Reports, 1833), where a coach proprietor was held liable for an accident from a defect in the iron axletree. This was the first case in the Superior Courts where the question arose—Are railway companies liable on the ground of *warranty* for the consequences of latent defects not discoverable by any care or skill? Three out of the four Judges in the Queen's Bench put the case on the ground of *negligence*, not *warranty*, so that the verdict was gained by the Company.

Mr. Justice Lush (who tried the case previously) said—"The motion was upon the ground that the carrier of passengers is bound to provide a roadworthy vehicle, and consequently he is liable if it turns out to be defective, although the defect is of such a nature that it could not be discovered or guarded against. It is *not* contended that the obligations of carriers of passengers is co-extensive with that of carriers of goods, who, by the custom of the realm, are insurers, subject only to certain well-known exceptions—the act of God or Queen's enemies. The grounds of a carrier's liability for goods are not applicable to a carrier of passengers. Mr. Justice Story, in his work on Bailments, sets forth the obligation is not absolutely to *carry a passenger safely*, but to exercise due care and diligence in performing the duty. I can see no reason why a carrier should be held *to warrant* for that which no care or diligence would enable him to secure. The Courts have drawn a clear distinction between the liability of a carrier of goods as an insurer

and the liability of a carrier of passengers for negligence. In *Stokes* v. *Eastern Counties Railway Company* (2 Foster and Finlason's Reports, 691) the Company were held not liable for an accident caused by a latent flaw, and the decision of the Lord Chief Justice was not questioned. I am of opinion the Judgment should be for the Company."

Mr. Justice Mellor concurred that railway companies were bound to use the utmost skill and care in all that concerned the safety of their passengers; they were not liable for defects which no care or skill could discover or guard against. "Lord Holt says—'Why carriers are held to be insurers is founded on the danger of carriers (in old times) colluding with thieves, if they were allowed to set up robbery or loss by accident as an excuse for failure to deliver goods.' If the breaking down of the carriage had been unexplained, perhaps there would have been a *primâ facie* case of negligence. The Company must use every precaution in known practical use. I am of opinion Judgment should be for the Company."

Mr. Justice Blackburn—"This is a question of very great nicety and importance, and, after some consideration and doubt, I have come to the conclusion that on the balance of English authority, and on principle and the analogy to other cases, there is a duty on the carrier to this extent, that he is bound at his peril to supply a vehicle in fact reasonably sufficient for the purpose, and is responsible for the consequences of his failure to do so, though occasioned by a latent defect, and therefore that the direction was wrong, and that there should be a new trial. I quite agree with my two brothers that the carrier of passengers is not, like the carrier of goods, an insurer who undertakes to carry safely at all events unless prevented by exceptional perils. I see nothing to diminish the obligation to provide a reasonably safe vehicle in the fact that it is to be provided for the safety of life and limb, and not merely of property. The carrier provides and selects the carriage, and the passenger is obliged to trust entirely to the carrier, having no means of examining the carriage and no voice in the selection of it." Judgment for Company.—*Tried at Queen's Bench, May* 15, 1867.—*From Law Journal Reports, vol.* 36, *page* 181.

The Plaintiff appealed to the Exchequer Chamber, and the case was again tried May 10, 1869, when the Judgment of the Court of Queen's Bench was affirmed, it being held that the Company were not liable in respect of such injury, there being no contract of warranty and insurance in the case of passengers that the carriage should be in all respects perfect for its purpose—that is to say, free from all defects likely to cause peril. Common carriers in such case are required to take due care.—*Law Journal Reports, vol.* 38, *page* 169.

589. *Phelps* v. *Great Eastern Railway Company.*—Action for £1,500 for personal injury. In November, 1868, Plaintiff was a passenger from Colchester; his carriage bumped and rocked, and ultimately left the rails, and one of the tires was broken. New wheels had been put on the carriage three weeks before the accident. There was a minute on the directors' board book to their law clerk to settle the claim. Plaintiff relied upon this as an admission of liability, and contended the carriage was improperly coupled, which was negligence for which the Company were liable. The Company contended there was an undiscoverable flaw in the wheel, and that the tire broke and caused the carriage to go off the line, and that the tire was not broken after but before the carriage left the rails. The engine-driver proved he examined the wheels and tires before the journey. Chief Baron Kelly, in summing up to the Jury, said it was for Plaintiff to make out that the accident arose from negligence on the part of the Company's servants. If the evidence left this point in doubt, they must find for the Company. The Company would not be liable for a defect or flaw in the iron. The alleged admission of liability by the Company's law clerk was not conclusive. The Jury found for the Company.—*Tried at the Croydon Summer Assizes, August* 16, 1869.—*Law Times Reports, vol.* 21, *page* 443.

PERSONAL INJURY ARISING FROM ACCIDENTS BETWEEN STATIONS—COLLISIONS, &c.—NEGLIGENCE.

	Case No.		Case No.
Grote v. *C. & H.* (1848)	590	*G. W. of Canada* v. *Fawcett* (1863)	596
Blake v. *Midland* (1852)	591	*Hart* v. *L. & Y.* (1869)	597
Allen v. *C. & H.* (1857)	592	*Ferns* v. *North British* (1872) ...	598
Bird v. *Great Northern* (1858) ...	593	*Blamires* v. *L. & Y.* (1873) ...	599
Dalton v. *South Eastern* (1858)...	594	*Richardson* v. *G. E.* (1875) ...	600
Ford v. *L. & S. W.* (1862)	595	*Phillips* v. *L. & S. W.* (1879) ...	601

590. *Grote* v. *Chester and Holyhead Railway Company.*—Action for personal injury from a railway accident, which arose from a bridge on the railway breaking down. It was held that it was a proper question for the Jury whether the Defendants had engaged the services of competent engineers, who had adopted the best method, and had used the best materials; and that if the Defendants had done so they would not be liable, but that the mere fact of their having engaged the services of such a person would not relieve them from the consequences of an accident arising from a deficiency of the work. Judgment against Company.—*Tried in Court of Exchequer, April* 29, 1848.—*From Welsby, Hurlstone, and Gordon's Reports, vol.* 2, *page* 251.

591. *Blake* v. *Midland Railway Company.*—Action by a wife, as administratrix for death of her husband by an accident caused by the negligence of the Company. It was simply a question of amount of damages. The case was first tried before Baron Parke, Derbyshire Summer Assizes, 1851, when the Judge, in summing up, told the Jury that until the Act of 9 & 10 Vic., cap. 93, compensation could not be recovered for the death of a person, the ancient common law maxim being that the value of life was so great as to be incapable of being estimated by money. The Plaintiff, by the death of her husband, came into £7,000. The husband's income was £850 a year. Fifteen and a half years was the probable time she would have enjoyed it during the joint lives of herself and her husband. This amounted to £13,188, and, deducting £7,000, a balance of £6,188 loss would remain. That the Plaintiff had experienced

a great deal of anxiety, and it was for the Jury to consider whether they would confine themselves to the pecuniary loss. The Jury returned a verdict for £4,000 damages. The Company appealed, on the ground that the Judge had misdirected the Jury as to the principle upon which the damages were to be assessed, and also that the damages were excessive. The Judgment on appeal was given by Justice Coleridge—"This case turns entirely upon the construction of the recent statute, and the question is whether, in giving damages for the death of the deceased, the Jury are confined to injuries of which a pecuniary estimate may be made, or may add a *solatium* in respect of the mental suffering occasioned by such death. Certain decisions in the Court of Session, Scotland, on the law of assythement have very properly been brought under notice. This law has not been introduced into England in its full latitude, or compensation for the loss of a parent by a wilful act, neglect, or default would be due to illegitimate as well as to legitimate children. The title of the Act under which the claim is made is 'An Act for compensating families of persons killed by accident,' not for solacing their wounded feelings. If a Jury were to proceed to estimate the relative degree of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of the Defendants. We must recollect that the Act we are construing applies not only to great railway companies, but to little tradesmen who send out a horse and cart in the care of an apprentice. For these reasons we are of opinion that the learned Judge at the trial ought more explicitly to have told the Jury that in assessing the damage they could not take into their consideration the mental suffering of the Plaintiff for the loss of her husband, and that, as the damages certainly exceeded any loss sustained by her admitting of a pecuniary estimate, they must be considered excessive." Rule granted for a new trial on the ground of misdirection.—*Tried in Court of Queen's Bench, February* 21, 1852.—*From Law Journal Reports, vol.* 21, *page* 233.

592. *Allen* v. *Chester and Holyhead Railway Company.*—Action for £4,000 for personal injury to a Post Office clerk from a

collision near Bangor, May 10, 1856. A goods train, owing to an accident to its engine, was only able to travel at about fifteen miles an hour, and the mail train ran into it. The Post Office van was the seventh vehicle from engine. No passenger was injured, nor were the carriages or trucks. The mail guard in same van was thrown on the mail bags, and his finger, entangled in some string, was cut. Plaintiff laughed at the scene, complained of no injury, and performed his duties to Holyhead and back to Chester same night. He did the same on the next night (10th May), but on the 12th complained of a headache, consulted a doctor, and went to Dr. Gully's hydropathic place at Malvern for seven months. Dr. Gully swore he suffered from loss of memory, inability to retain urine or fæces, seminal weakness, &c., attributed by Mr. Solly and Dr. Lewis (physician to Post Office) to injury to brain and spine. Mr. Solly was of opinion that concussion of the brain might arise in a railway accident and no visible symptoms occur for a considerable time. In August Plaintiff obtained £250 from Passengers' Assurance, and it was not until October he claimed from Company, issuing a writ in November. A few days before issue of writ he made a proposal for assurance to the United Kingdom Office, and was refused. Two surgeons gave evidence for Company that the absence of any symptoms at the time, or for twenty-four hours afterwards, negatived any injury to brain or spinal cord. The Company failed to rebut negligence through stupidity of a witness. An interval of seventeen minutes was proved between departure of trains from Conway. Judge summed up in Plaintiff's favour. Verdict for Plaintiff, £1,400.—*Tried before Justice Cockburn, Common Pleas, Feb.* 18, 1857.

593. *Bird* v. *Great Northern Railway Company.*—Action for personal injury on the ground of alleged negligence. The engine left the rails where they were not "fished," although the line about the same spot was in course of being "fished." The fact of the rails not being so "fished" was relied upon as evidence of negligence. The Jury were not able to find a verdict for Plaintiff on this plea, and he appealed. On the appeal case Chief Baron Pollock said—"It is for the Plaintiff to prove negligence. The Company's undertaking was not

to carry safely, but to carry with reasonable care. They are not, as (in the case of) carriers of goods, insurers; therefore the burden of proof was on the Plaintiff." Verdict for Company.—*Tried in Court of Exchequer, Nov.* 4, 1858.—*From Law Journal Reports, vol.* 28, *page* 3.

594. *Dalton* v. *South Eastern Railway Company.*—Action for £600 for the death of Thomas Dalton, on the 28th June, 1857, in a collision occurring between Blackheath and Lewisham. Plaintiffs were the father and mother of deceased, and were about fifty years of age and in poor circumstances. Deceased was a pianoforte maker, and earned £150 a year. For seven or eight years he had lived apart from his parents, but visited them fortnightly, bringing presents of about £10 a year and pecuniary aid about another £10 a year. The case was tried at the Middlesex Sittings after Hilary Term, 1858, when the Jury gave a verdict for £120 damages (£80 for the father and £40 for the mother), with £15 funeral expenses and £10 for mourning. The Company appealed, and on the new trial Justice Willes said—"The great question in this case was disposed of in the Court of Exchequer in *Franklin* v. *South Eastern Railway Company*, by which it is decided, with our entire concurrence, that *legal liability alone* is not the test of injury in respect of which damages may be recovered under Lord Campbell's Act, but that a reasonable expectation of pecuniary advantage by the relatives remaining alive may be taken into account by a Jury, and damages may be given in respect of that expectation if it be disappointed and the probable pecuniary loss thereby occasioned. In respect, therefore, of the sum of £120 given as damages on that footing the verdict must stand. As to the claim for funeral expenses and mourning, however, we may think they cannot be allowed. The subject matter of the statute is compensation for injury by reason of a relative not being alive, and there is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral or in putting on mourning for his loss. The rule must therefore be absolute to reduce the verdict by those expenses, and the £120 damages must stand."

—*Tried in Court of Common Pleas, May* 6, 1858.—*From Law Journal Reports, vol.* 27, *page* 227, *C.P.*

595. *Ford* v. *London and South Western Railway Company.*—Action for £1,500 for personal injury, Plaintiff having broken two ribs, dislocated his shoulder, received a severe blow on his blade-bone, and being otherwise materially injured. An accident happened near Epsom Junction on 28th January, 1861, to an express train of ten carriages and a brake van. One of the tender wheels got off the line, and upon going round a curve three carriages fell down the embankment on one side, and two on the other. Plaintiff contended negligence—(1) That the tire of the wheel was in an improper state; (2) that the train was going at too fast a rate; (3) that the gauge between the metals at the curve was in some places wider than others; (4) that the brake van (placed between the fourth and fifth carriage) was in an improper place. The Company contended that twelve minutes before the accident trains passed in safety over the place, and that the line could not have been unsafe; that the accident did not arise from the wheel of the tender leaving the rail, but from one of the carriages flying off; that the train was an express train, and was not going at a greater speed than thirty miles an hour; that the metals would always vary, even on the best managed railways; that it was a matter of opinion where the brake van should be placed; that some carriages were to have been shunted, and it could not have been put nearer to the end of train. The Company proved that practical experience had shown that a tire need not be replaced until worn down below seven-eighths of an inch, and that it had not been worn below an inch.

Chief Justice Erle said—"The action was grounded on negligence. Negligence is not to be *defined*, because it involves some inquiry as to the *degree* of care required. The Company is bound to take *reasonable* care, to use the *best precautions in known practical use* for securing the safety of passengers. If they have done so, they have done their duty, and are not guilty of negligence; if otherwise, the contrary. You are to consider what *is* reasonable care, and whether they used the proper precautions. At the same time, a Jury would not be entitled to

expect the *utmost* that could *possibly* be conceived, or the highest possible degree of skill. It is sufficient if they use every precaution in *known practical use* for the *safety* and *convenience* of the passengers. Both objects must be looked to. Slower speed would add to security, while it would entail a very great degree of inconvenience. A company ought not to be found guilty because they did something more for safety at a greater sacrifice of convenience. (1) Was there negligence in using the tender wheel, and if so, did that cause the injury? (2) Was there negligence in the speed of the train, and did that cause the damage? (3) Was there negligence in respect of the brake power, either as being insufficient or badly placed, and did that cause damage?" The Jury found there was negligence in using the wheel of the tender, but that it did *not* cause damage; that there was negligence in the other counts, which caused the damage. Verdict, £1,500.—*Tried in Court of Common Pleas*, 1862.—*Foster and Finlason's Nisi Prius Reports, vol.* 2, *page* 730. (The Company moved for a new trial, not on the ground of misdirection, but as against evidence. The Court, however, refused the rule.)

596. *Great Western Railway of Canada* v. *Fawcett, and also Braid.*—Action by two widows for the death of their husbands, arising from the giving way of part of an embankment running along the side of a hill between Hamilton and Copetown, Canada West. A gap 45 yards wide had been made, and about 2 a.m., March 19, 1859, the train in which the two deceased men were travelling fell into the gap, and they were killed. The weather had been wet for two or three days previously, and the winter's frost was coming out of the ground; the night in question was very stormy, and from 6 p.m. of the 18th March there had been an excessively heavy rain. A loaded train had passed safely over the place of the accident within an hour of the time when the accident occurred. Plaintiffs contended the accident arose from the Company having the embankment, and the culverts, drains, and gutters thereof, unskilfully and improperly placed and built, and also constructed of insufficient materials and size; that the fact of having an embankment of porous materials on the slope

of a hill about 150 feet high 100 feet down the slope, without a ditch that gave a free course to the water coming down the hill towards the embankment, is clearly unskilful and negligent. The case was first tried October 31, 1859, at Hamilton, before the Hon. Sir John Beverly Robinson, Chief Justice of Upper Canada. He left to the Jury—(1) Was the providing and maintaining a good drain to the east culvert a proper precaution to be taken? (2) Did the Company neglect that precaution? (3) Was such neglect the cause of the accident? He said—"On the first issue I think the evidence and the dictates of common sense are with the Plaintiffs, and that omission to secure proper drainage would be culpable neglect. On the second issue there is in the evidence more room for a doubt. On the third the Jury must determine." The Jury returned a verdict for $5,000. A rule *nisi* for a new trial was obtained, on the ground that the Jury should have been told there was no evidence of negligence, or that the weight was in favour of the Company, and that the Company were not bound to provide against extraordinary storms. The Court discharged the rule, thus affirming the verdict of the Court below. The Company then appealed to the Court of Error and Appeal of Upper Canada, when the Judgment was affirmed. The Company then appealed to the House of Lords. Lord Chelmsford, in giving Judgment, said—"The part of the railway where the accident occurred was carried over an embankment made on the slope of a hill, and had been in use for four or five years without any injury having happened. Their Lordships, without attempting to lay down any general rule, which would probably be impracticable, think it sufficient for the purposes of their Judgment to say that the Company ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur. Now the evidence, fairly considered, shows nothing beyond this in the character and degree of the storm which destroyed the embankment. One witness says it was 'a bad night, very bad;' another, in the usual style of exaggeration, that it was 'the worst night he ever saw.' It is stated by others that the rain 'washed away bridges and portions of the road.' One of the Plaintiffs' witnesses

describes the storm as 'a very unusual one,' and another witness as 'an extraordinary storm.' In the whole of this evidence there is nothing more proved than that the night was one of unusual severity; but there is no proof that nothing similar had been experienced before, nor is there anything to lead to a conclusion that it was at all improbable that such a storm might at any time occur. It appears there was a ditch made for the purpose of carrying off the water that came down the hill; but it was either imperfectly constructed from the first, and of insufficient dimensions, or it was suffered to be obstructed and choked up, so that when an unusual quantity of water flowed into it, it was unequal to the occasion. The Company's engineer, in his report, says—'It appears from the levels that there was a depression of two feet in one place. The ditch is an imperfect one. If that depression of two feet had been filled in, I question whether that accident would have occurred.' It is evident that the embankment was insufficiently provided with means of resisting the storm, which, though of unusual violence, was not of such a character as might not reasonably have been anticipated, and which, therefore, ought to have been provided against by all reasonable and prudent precautions. Even supposing the learned Judge omitted to explain to the Jury what amount of *vis major* would exonerate the Company from the charge of negligence, yet their Lordships are of opinion that had this direction been given, and had the Jury been led by it to find for the Company, their verdict would have been wrong." Judgment affirmed, and consequently against the Company.—*Tried before the Judicial Committee of the Privy Council, February* 21, 1863.—*From Law Times Reports, vol.* 8, *page* 31.

597. *Hart* v. *Lancashire and Yorkshire Railway Company.*—Action for personal injury. Plaintiff was seated in a train at Miles Platting ticket platform, and the tickets were being collected. An engine-cleaner was shunting an engine across from the coaling siding to the engine shed. While doing this he fell down on the footplate in a fit just as he should have reversed the engine. The signalman saw this, and purposely turned the moving engine on to the ticket

platform line, as the up and down express trains were both nearly due on the other lines, and the engine would have run into one or the other according as the points might have been turned. Owing to the collision at the platform, Plaintiff was injured. The case was first tried at Liverpool Assizes, when the Jury held there was negligence, and gave a verdict for £110. The Company appealed, when Chief Baron Kelly said—"I think there was no negligence at all, and I must confess that I see no evidence of any. It has been contended there ought always to be two men on an engine; but if that be the case, I see no reason why it should not be a necessary one in every imaginable case where one man is employed in any duty whatever about a railway." Baron Bramwell said—"Suppose we were to hold that this verdict was right, and the Company were to do what I think they would not be blamable for doing, to publish a new and increased tariff, and to say—'Whereas the Court of Exchequer has laid it down as law that two men are necessary on every engine, under all possible or conceivable circumstances, where only one man was accustomed to be employed before, therefore we have raised our fares to such and such prices, to meet the extra expense imposed on and incurred by us in complying with the decision of the Court.'" The Company having made some alteration in the sidings since the accident, Baron Bramwell said—"People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell Juries, to hold that because the world gets wiser as its gets older, therefore it was foolish before." Barons Channell and Cleasby concurred. Judgment for Company.—*Tried in Court of Exchequer, June* 10, 1869.—*From Law Times Reports, vol.* 21, *page* 261.

598. *Ferns and M'Cormick* v. *North British Railway Company.*—Action for personal injury. Plaintiffs (Ferns and M'Cormick) were travelling in a train from Glasgow to Airdrie. Near Sunnyside (Coatbridge Station) a goods train was passing on the other line. Two waggons of the goods train got off the rails while the train was in motion, and the passenger train

struck them and was also thrown off the rails, and Plaintiffs were injured. Plaintiffs contended that a waggon belonging to the Glasgow Police Board—one of the waggons that got off the rails from the goods train—had lower buffers than the Company's waggon coupled to it behind; that the buffers of the two waggons got interlocked, and that the Company's waggon—the first to leave the rails—was thus jerked off. The accident occurred on a curve. It was proved that the buffer of the Company's waggon came opposite the police waggon to the extent of a space of 6 inches on one side and $4\frac{3}{4}$ inches on the other. Skilled witnesses said this was sufficient, but it would have been better if it had been more.

The Lord President said—"As to the law, it lies upon the Plaintiffs to prove this collision took place through the fault of the Company; and if they do not prove that, they cannot recover damages. The obligations of a company in conveying passengers are quite different from those that belong to them as carriers of goods. To a certain extent (contrasted with goods) passengers can take care of themselves; and, at all events, they are intelligent beings present upon the scene of any accident that occurs, and capable of giving an account of what occurred. Therefore they are not entitled, according to the legal rule, to recover damages for any injury done to them in the course of their journey, unless they can prove that it has occurred through the fault of the carrier who is carrying. The law is not peculiar to the case of railways, for the same law prevailed in old days, before railways were known; for a coach proprietor was answerable if an accident occurred from his using horses of vicious temper, or from his having a careless driver or an ill-constructed coach. But he was not liable for a mere accident that could not have been foreseen or prevented. If two trains meet each other on the same line of rails, it is impossible that that could have happened without the fault of the company; but when two trains are running upon opposite lines, as here, and the accident occurs through some of the waggons upon the one line getting suddenly off that line and coming in contact with the train running upon the other line, it must be obvious to you that that may have occurred either through unaccountable accident or through the fault of the

company; and that is just the case you are now trying." The Jury gave a verdict for the Company.—*Tried in Court of Session (First Division), Scotland, July* 24 *and* 25, 1872.—*From Law Times Reports, vol.* 27, *page* 178.

599. *Blamires* v. *Lancashire and Yorkshire Railway Company.*—Action for personal injury. Plaintiff was a passenger by an excursion train, Cleckheaton to Blackburn. After passing Blackburn eight of the twenty-eight carriages forming the train became detached, and one carriage, in which Plaintiff was, fell over an embankment four yards high, and Plaintiff sustained the injuries of which he now complained. It was found the tire of one of the wheels of the carriage had been fractured near one of the rivet holes; hence the tire was loose, and caused the accident. There was a serious jerk to the carriage half a mile after passing Blackburn; in three or four minutes after a more severe shock, throwing the passengers together; and three quarters of a mile further the accident happened. The Plaintiff contended that under the Railways Regulation Act, 1868 (31 & 32 Vic., cap. 119, sec. 22), the Company were bound under penalties of £10 for each default in neglecting to attach means of communication between passengers and the servants controlling the train, when a train travelled more than twenty miles without stopping. The time-table showed the train would run more than twenty miles without stopping. The Company gave evidence that they gave peremptory instructions to their servants with the train to stop every twenty miles.

The case was first tried before Chief Baron Kelly, who left to the Jury—(1) Were the instructions given to the Company's servants and the time-tables, *taken together*, to the effect that all excursion trains were to be stopped once within twenty miles? (2) Was the want of communication negligence or a breach of duty on the part of the Company? (3) Did the want of such communication cause or materially conduce to the accident? (4) Was the accident caused by the negligence of the Company? The Jury answered—(1) No; and the other questions, Yes. They also found the material the tire was composed of was sufficient for the purpose, and they negatived

the existence of any negligence on the part of the Company on that ground. They gave Plaintiff £350 damages. The Court of Exchequer refused the Company a new trial on the ground of misdirection, hence the Company appealed to the Exchequer Chamber.

On the appeal case Justice Blackburn said—"The Jury having negatived the existence of negligence from the breaking of the tire, was there negligence from the absence of communication between the passengers and the servants controlling the train? The Jury found it conduced to the accident the Company not stopping the train every twenty miles. I am of opinion there was reasonable evidence to go to the Jury, and it was for them to say if the ordinary means of communication had existed the mischief could have been prevented by the train stopping in time. I am of opinion the case could not have been properly withdrawn from the Jury, and that the train being one to which the Act applied, and the mischief happening in consequence of the absence of the statutory precaution, our Judgment should be against the Company." Justices Keating, Brett, Grove, and Archibald concurred. Judgment against Company.—*Tried in Court of Exchequer Chamber, June* 27, 1873.—*From Law Journal Reports, vol.* 42, *page* 182.

600. *Richardson* v. *Great Eastern Railway Company.*—Action for £230 for personal injury, arising from an accident near Sawbridgeworth, on 11th September, 1873, by a goods van on a goods train, when passing a passenger train, leaving the rails and tearing out the side of the carriage in which Plaintiff sat. The cause of the van leaving the rails was the breaking of the leading axle of a truck (104) immediately in front of it. This was a loaded coal truck belonging to the Birmingham Waggon Company, but rented from them and used by J. & H. Girling. The truck was passing with a load of coal from the system of the Great Northern Railway Company to that of the Great Eastern Railway Company. It was examined at Peterborough by Moorcroft, the Great Eastern Company's chief examiner, who found one of springs was depressed, and there was a crack in the sole. The truck was consequently

detained five days at Peterborough, where the Birmingham Waggon Company put in a new spring, but did not repair the sole, as to do so would have rendered necessary the unloading of the truck, which was not done. The Birmingham Waggon Company wished to have the truck back for a thorough overhauling, and Moorcroft himself put this mark upon the truck—"Stop at Peterborough for repairs when empty. 10/9/1873." The examination which had taken place had not extended to a minute examination of the axle by scraping off the dirt, and there was no possibility of discovering without so doing the flaw which, as it turned out, existed in the axle.

The case was first tried at Kingston, in March, 1874, before Chief Baron Kelly, who left the following questions to the Jury:—

1. Would the defect in the axle, which was the cause of the accident, have been discovered or discoverable upon any fit and careful examination of it to which it might have been subjected? Answer—Yes.

2. Was it the duty of the Company to examine the axle by scraping off the dirt and minutely looking at it, so minutely as to enable them to see the crack, and so to prevent or remedy the mischief? Answer—No.

3. If that was not their duty upon the first view of the truck, did it become their duty so to do when, upon having discovered the defect, they ordered it to be repaired, and it remained for four or five days upon their premises for that purpose? Answer—It was their duty to require from the Waggon Company some distinct assurance that it had been thoroughly examined and repaired.

Upon these findings the Judge directed a verdict for the Company upon the ground of the answer given to the second question; and with regard to the answer given to the third question, gave Plaintiff leave to move to set aside the verdict and enter for him if, upon that finding and the whole of the facts of the case, the Plaintiff should, in the opinion of the Court, be so entitled.

On the appeal case Chief Justice Lord Chelmsford said—"The Great Eastern Company, under the 92nd clause of the Railway Clauses Consolidation Act, is bound to carry the trucks

and goods in trucks of other carriers and of private individuals or Companies which come upon their line, and which they are bound to forward upon payment of certain tolls. There was, we now know, a latent defect, viz., a crack in the axle. It is admitted this last defect caused the accident. Were the Company guilty of negligence in not discovering it? The fact was that the Waggon Company were anxious to make an examination by overhauling the truck when empty, and, knowing this (by their servant Moorcroft), it was negligence in the Company to let it go on its journey, as it was to save the trouble of unloading it. What answer is it to a man who is suffering from the terrible effects of an accident to be told that the Company, knowing a truck to be unsound, yet choose to run the risk of its lasting through the journey? There was clear evidence, therefore, in my opinion, that there was negligence in the Company." Justices Denman and Huddleston concurred. Judgment against Company, £250 damages.—*Tried in Court of Common Pleas, May* 6, 1875.—*From Law Times Reports, vol.* 33, *page* 248.

The Company carried the case to the Court of Appeal, when the Master of the Rolls (Jessel) said—"We must look to what is reasonable in reference to the exigencies of mankind. The Company cannot stop all foreign trucks and empty them for the purpose of a minute examination. If they were entitled to do so, it would practically destroy the right given by statute to other companies of having their through traffic forwarded, and give a monopoly to the Company itself. The suggestion that they should do this is too absurd to bear discussion. There must be some reasonable limit to the amount of examination required, and the substantial question was whether the mode of examination adopted by the Company was reasonably satisfactory. The accident occurred through a defect in no way connected with the two defects discovered, namely, a defect in the axle. If the defects discovered were such as ought reasonably to induce a person of experience to think that some other defect existed or was likely to exist, then there would be a duty to examine further; but if the defect discovered had no probable connection with any other undiscovered defect, then I see no reason why any further examination should be made." Lord

Justice Mellish and Baron Pollock concurred. Judgment for Company, reversing the Judgment of the Court of Common Pleas.—*Tried in Court of Appeal, May* 10, 1876.—*From Law Times Reports, vol.* 35, *page* 351.

601. *Phillips* v. *London and South Western Railway Company.*—Action by a London physician for personal injuries arising from a railway accident between an engine and a train on 8th December, 1877. The case was first tried before Justice Field in April, 1879, and a Special Jury of the City of London, when damages £7,000 were given, it having been held that the accident arose from negligence. Plaintiff was forty-six years of age, and for ten years preceding the accident he made an average income of £5,000 a year. He had incurred £1,000 expenses before the trial, and he enjoyed a private income of £3,500 a year. Plaintiff considered the damages of £7,000 insufficient, and appealed to the Court of Queen's Bench for a new trial. Chief Justice Cockburn said—"We are of opinion there must be a new trial. We are led to the conclusion, not only that the damages are inadequate, but that the Jury must have omitted to take into consideration some of the elements of damage which ought to have been taken into account. The Plaintiff was a man of middle age and robust health. His health has been irreparably injured to such a degree as to render life a burden and a source of the utmost misery. He has undergone a great amount of pain and suffering. The probability is that he will never recover. His condition is at once helpless and hopeless. The expenses incurred by reason of the accident have already amounted to £1,000. Medical attendance still is, and is likely to be for a long time, necessary. He was making an income of £5,000 a year, the amount of which has been positively lost for sixteen months. The positive pecuniary loss thus sustained all but swallows up the greater portion of the damages awarded by the Jury. It leaves little or nothing for health permanently destroyed and income permanently lost. Generally speaking, we agree with Justice Brett, in *Rowley* v. *London and North Western Railway Company*, that a Jury 'must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a

reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation.' But we think a Jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration, as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business, which again may be of a temporary character or may be such as to incapacitate the party for the remainder of his life. There can be no doubt of the power of the Court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply where they are insufficient to meet the justice of the case. The rule must therefore be made absolute for a new trial."—*Heard in the Court of Queen's Bench, April 25 and June 20, 1879.—From Law Times Reports, vol. 40, page 813.*

The Company carried the case to the Court of Appeal to resist the decision of the Court of Queen's Bench granting a new trial. The appeal was heard July 28, 1879, when Lord Justice James confirmed the decision of the Court of Queen's Bench for a new trial.

In November, 1879, the new trial came on before Chief Justice Coleridge and a Special Jury, at Westminster, when the Jury gave a verdict for £16,000. The Company appealed to the Court of Common Pleas for a new trial, and it was refused. The Company then carried the case to the Court of Appeal for a new trial, when Lord Justice Bramwell said—"I am of opinion there should be no rule for a new trial. I cannot say that I think the verdict of the Jury wrong; on the contrary, I think it at least right. I will assume that they gave the Plaintiff £1,000 for his pain and suffering, and three years' income at the rate of £5,000 a year. They ought at any rate to have given him as much as that, and the only misgiving which I have is whether they ought not to have given him more. It is said to be unreasonable that where two persons are carried for the same fare one of them, if injured, should recover £10,000 against

the Company, while the other would only be able to recover £1,000. It may be unreasonable as regards the two passengers *inter se*, but it is not unreasonable as between the Company and the public. The Company have taken their powers upon certain conditions, and one of them is that if they break their contracts to carry they shall make compensation to persons injured by reason of the breach." Lord Justice Brett concurred, and said in the case of *Rowley* v. *London and North Western Railway Company* Chief Baron Kelly tried to direct the Jury to a perfect compensation by telling them to calculate an annuity which would produce for a certain number of years, or for such years as they might think necessary, such a sum as the Plaintiff was making yearly. The Court of Exchequer Chamber in that case thought the direction wrong. Lord Justice Cotton concurred. Judgment against Company, who were thus left to pay the £16,000.—*Tried in Court of Appeal, December* 17, 1879.—*From Law Times Reports, vol.* 42, *page* 6.

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602. *Singleton* v. *Eastern Counties Railway Company.* —Action for personal injury to a child three and a half years old, who strayed upon a railway and had its leg cut off by a passing train. Held—That in the absence of any evidence to show that the child got there through some neglect or default on the part of the Company, they were not responsible for the

injury. Judgment for Company.—*Tried in the Court of Common Pleas, November* 4, 1859.—*From Scott's Common Bench Reports. vol.* 7, *page* 287.

603. *Marfell* v. *South Wales Railway.*—Action for £35 for a horse killed on a level crossing. Plaintiff was a haulier in the Forest of Dean. By the side of the Company's line is a tramway, their property, running some distance beside the railway, and then across the line to the Regulator Colliery. There were gates at the crossing, but they were always open. The tramway is open at one side, but between it and the railway there is a sufficient fence down to the gate. The Plaintiff used the tramway, and paid tolls to the Company. On 12th November two horses drawing loaded trams were on the tramway, and Plaintiff walking by their side in charge. Near the crossing the fore horse took fright at an approaching train, rushed through the open gate on to the crossing, and was killed by the train. The case was first tried at Gloucester Spring Assizes, before Baron Bramwell, when Plaintiff got a verdict for £35. The Company appealed to the Court of Common Bench. Chief Justice Erle held that "in questions of negligence it is essential to ascertain that there is a legal duty on the party charged and a breach of that duty, and there was no evidence of such duty on the Company in this case. The statute 8 & 9 Vic., cap. 20, sec. 68, which imposes upon a railway company an obligation to fence as against *adjoining owners*, has no application in such a case as this, the Company being under no obligation to erect a fence separating the railway from the tramway, both being their property." Justices Williams and Byles, however, held that there was negligence, and that the gate should have been shut. Judgment against Company.—*Tried in Court of Common Bench, June* 5, 1860.—*Law Times, vol.* 2, *page* 629.

604. *Manchester South Junction and Altrincham Railway Company* v. *Fullarton.*—Action to recover damages for alleged negligence and misconduct on the part of the Company's engine-driver in discharging steam through the mud cocks of one of their engines on their line at a level crossing, in consequence whereof the Plaintiff's horses took fright, ran away with

and broke the carriage to which they were harnessed, and injured themselves. This was near to Altrincham Station, where the Company's line crosses on the level a turnpike road.

The County Court Judge found a verdict for Plaintiff for £40, against which the Company now appealed.

On the appeal case Chief Justice Erle said—"I am of opinion that the evidence abundantly shows that the Company, by their servants, exercise their right of crossing the highway in an inconvenient and improper manner whilst near the gate which separates the railway from the road. The driver blew off the steam from the mud cocks in front of the engine so that the Plaintiff's horses became enveloped therein and frightened, and so became unmanageable. It is clear that the Company have not used their railway with that attention to the rights and safety of the Queen's subjects which, under the circumstances, they were bound to exercise. The Company having thus been guilty of culpable negligence, the decision of the County Court Judge must be affirmed." Judgment against the Company.—*Tried in the Court of Common Pleas, April* 29, 1863.—*From Scott's Common Bench Reports, vol.* 14, *page* 54.

605. *Condon* v. *Great Southern and Western Railway Company.*—Action for personal injury. Plaintiff was a dairymaid to Mr. Hewson, and her deceased husband was herd to the same master. Both her husband and a son fourteen years of age were killed crossing the Company's line on the 26th July, 1863. She had recovered £400 damages for the loss of her husband. She now claimed damages under Lord Campbell's Act for the death of her son, who had never earned any wages, but whose capabilities were valued at 6d. per day. The probability that he would have enabled his mother to earn more, or would have devoted part of his earnings to her support, was held to be evidence to go to the Jury upon the question of damages, the probability being increased by the past filial conduct of the deceased. On the first trial the Jury found £10 damages for the Plaintiff. On the appeal case it was decided that there was evidence to go to the Jury in this case, and consequently the verdict against the Company was not disturbed. Judgment against the Company.—*Tried in the Court of Ex-*

chequer (Ireland), 29th May, 1865.—*From Irish Common Law Reports, New Series, vol.* 16, *page* 415.

606. *Stubley* v. *London and North Western Railway Company.*—Action by a husband, as administrator, for the death of his wife, who was killed by an express train at a public foot-path crossing. The crossing over the line was close to Batley. The view along the line in one direction was obscured beyond thirty yards until the person stood within two or three yards of the rails, when there was a view for 300 yards. There were notice boards each side of the path with "Beware of the Engine" on them. Deceased, a mill hand, was crossing to her work. A goods train had just passed in one direction, and deceased attempted to cross, when an express train coming in the other direction killed her. A man near shouted to her, but the poor woman was deaf, and probably did not hear the man or the train coming. The case was first tried before Justice Blackburn, at the Leeds Summer Assizes. The Judge told the Jury the Legislature had authorised the Company to cross this path with their railway on a level, and had not required a foot-bridge; that it might be assumed that the Company should take reasonable precautions; and that it was a question for them whether or not there should have been a watchman at the crossing to warn persons. The Jury found that a watchman was a reasonable precaution, and that it had been neglected. Verdict for Plaintiff. Leave was reserved to the Company to move to set aside the verdict and enter a non-suit on the ground that there was no evidence of negligence on the part of the Company to be left to the Jury. On the appeal case Baron Bramwell said—"I am of opinion this rule should be made absolute. It is easy to use general expressions about negligence, but the question is—What is it alleged the Company ought to have done? It is answered—They should have had a person to warn the people. Look at the facts of the case. A person coming down to the rails and contenting himself, in the first instance, with just walking to the edge, without putting his foot on the line, could see up and down nearly 300 yards, a distance of about one sixth of a mile. The train would come up that distance in about forty seconds, and a man walking

about three miles an hour would cross the line in about four seconds; thus he would cross the line ten times from the time when the train first appeared until it came up, and, allowing a woman double the time, she could cross it five times. Is it necessary, under such circumstances, that any person should be placed there to warn people of what they could see for themselves? But it is said two trains meet at this very point. Is it reasonable or possible that trains should be timed so as not to do so? and what could a watchman have done but give warning of what everyone accustomed to crossing a carriage road knows, or ought to know, namely, if you cross a road immediately after a carriage has passed you on your own side, you take the chance of finding something coming the other way? What this woman really did seems to have been this—she seems to have forgotten the possibility of the existence of any other train than the luggage train, and directly it was out of the way to have crossed. Under these circumstances it seems nonsense to say that the public can impose any such duty as that suggested. One is sorry for the particular case, but I protest that I sincerely believe that more mischief would happen from so attempting to take care of persons who ought to take care of themselves. There is no part of a line where people's improvidence may not put them in danger, and a watchman cannot be kept everywhere. Besides, are there to be no unexpected trains, no special engines, the times of which the watchman would not know, though he would those of the ordinary trains? Then, if he did not warn a person, he would cross as a matter of course, and the very precaution adopted might prove fatal. One word as to the case of *Bilbee* v. *London Brighton and South Coast* (13 L. T., 146). I cannot treat that as an authority to govern the present case. It establishes no precise rule or precedent, and the Judgment seems to guard against its being considered to do so. If a railway be so constructed that, either from the abruptness of the curve or some other reason, a person cannot see a train coming, some measure of precaution on the part of the Company may be necessary. That is the ground on which *Bilbee's Case* stands, but here there were no such reasons for precaution." Chief Baron Pollock, Baron Channell, and Baron Pigott concurred. Judg-

ment for Company.—*Tried in Court of Exchequer, Nov.* 18, 1865.—*From Law Times Reports, vol.* 13, *page* 376.

607. *Bilbee* v. *London Brighton and South Coast Railway Company.*—Action for £60 for personal injury from being knocked down and run over by a train at a level crossing. The crossing was near Thornton Heath Station, on the Croydon and Battersea branch. The crossing was for horses and carriages, and the main gates were kept locked, and opened by an attendant as required. There were swing gates at the side for foot passengers, kept unlocked, and no attendant was kept to warn foot passengers that trains were expected. Over a hundred trains a day passed over the crossing. In one direction there was a curve, and in the other direction, about 150 yards distant, there was a bridge, so that the view in both directions was limited. Plaintiff was deaf, and did not hear the noise of an approaching train. A train was coming in each direction when he was crossing, and one knocked him down. Since the accident the Company had placed an attendant in charge of the swing gate. The case was first tried before Chief Justice Erle, at the London Sittings after Hilary Term, and the Jury gave a verdict for £60. Leave was given to move to enter a non-suit if the Court should be of opinion that there was no evidence of any breach of duty or negligence on the part of the Company. On the appeal case Chief Justice Erle—"I am of opinion this rule should be discharged. I am fully impressed with what has been said by the Company's counsel, that the Court ought to be careful not to impose any burdens on a railway company that are not imposed upon them by Act of Parliament; and I do not say that railway companies must keep servants at every crossing, but at this particular crossing there were circumstances of peculiar risk for foot passengers. A hundred or more trains passed the spot in the day, and there was a curve, and also a bridge, which impeded the sight and prevented persons from seeing trains which were coming at any distance. I cannot say, therefore, that there was no evidence of negligence for the Jury." Justice Byles, Justice Keating, and Justice M. Smith concurred. Judgment against Company. Statutes referred to relating to level crossings over high

roads—2 & 3 Vic., cap. 45, sec. 1; 5 & 6 Vic., cap. 55, sec. 9; 8 & 9 Vic., cap. 20 (the Railway Clauses Consolidation Act, 1845), secs. 46, 47.—*Tried in Court of Common Pleas, May* 9, 1865.—*From Law Times Reports, vol.* 13, *page* 146.

608. *Stapley* v. *London Brighton and South Coast Railway Company.*—Action by executors for death of John Stapley, killed by an express train at a level crossing close to Portslade Station, on Brighton and Worthing branch. The line at the crossing is rather on an incline, and trains run at a high rate of speed, and they do not whistle when passing. It is a public highway, with carriage-way and foot-way; there are swing gates across the carriage-way, and swivel gates at the side for foot passengers. Deceased was deaf. The express was four minutes late. The train is visible six to seven hundred yards from the crossing. The former attendant to the gates had been killed, and the regular station-master was absent from illness, and the relief station-master was attending to the station and the gates. The deceased was seen on the crossing when the express was 150 yards off, and the man who saw him shouted, but deceased paid no attention, and the train struck and killed him. There was no whistle until either a second or two before or at the moment of the accident. One of the swing gates was a little open, and whether he passed through it or through the swivel gate is not known. There was no evidence who opened the gate, but it had been seen closed half an hour before the accident. The case was first tried July 1, in London, before the Lord Chief Baron, when a verdict was given for Plaintiffs; and a rule was obtained to set aside the verdict on the ground that it was against the weight of evidence, and that there was contributory negligence on the part of the deceased, and that there was no evidence to go to the Jury of negligence on the part of the Company. On the appeal case Baron Channell said—"The rule was argued before the Lord Chief Baron, my brother Pigott, and myself. We are of opinion that the rule should be discharged. The deceased was run down at a station on the Company's railway. At the station or close by were a carriage-way and a foot-way which crossed the line on a level. On each side there were

swing gates; it did not appear whether these, when shut, had any fastening or not. The express was four minutes late, and the deceased was crossing somewhat transversely. It was contended that, being deaf, he should have looked about him and taken more care, and should have kept the direct path. However, as before stated, we see no reason on these grounds to interfere with the verdict. It was argued that whatever obligation was imposed by statute (46th section of the 8 & 9 Vic., cap. 20) or by the regulations, it was intended for the protection of carriage passengers, and not foot passengers. But suppose this had been the case of a carriage passenger: there was no gateman there, and, although a train was due, the gate was open as if none were due. There is no doubt a carriage passenger would have a right to complain of this as negligence; and the Court are of opinion that, where this kind of invitation is held out to a foot passenger, it is evidence of negligence on the part of the Company that ought not to be withdrawn from the Jury. Although the Legislature has authorised the Company to cross a public highway on a level, it has not exempted them from the use of due and ordinary care." Chief Baron Pollock concurred. Judgment against Company. —*Tried in Court of Exchequer, November* 14, 1865.—*From Law Times Reports, vol.* 13, *page* 406.

609. *Wyatt* v. *Great Western Railway Company.*— Action for personal injury, occurring in going over a level crossing with a horse and carriage at night time. The level crossing was situated at Chipping Campden, over a turnpike road. The gates were so constructed that, after being opened to form a passage along the turnpike road, they flew back and closed themselves across the road to protect the railway. Plaintiff, on driving up to the closed gates, waited a long and reasonable time, but no Company's servant came to open the gates; he then got out of his conveyance, led the horse and carriage through the first gate, and opened the second gate. He was then getting into his carriage to drive through the second gate, when it flew back and shut itself, and in so doing struck the horse with great violence and drove it back, causing the horse to swerve suddenly round and become unmanageable,

whereby the Plaintiff was thrown out of the carriage upon the railway, and received injuries as aforesaid.

Judgment was given by Chief Justice Cockburn, who said —"I am of opinion the Judgment must be for the Company. The Railway Clauses Act amounts virtually to a prohibition to individuals from passing over the railway under the circumstances in this case. Parliament authorises a railway to pass over a highway and to obstruct the public highway; thus it is an obstruction created by the Act. When circumstances require the gates to be opened, and justify their being opened with regard to safety, the company's servants shall open them and close them; otherwise they shall be left, according to the express language of the section, constantly closed. I take that to be a prohibition to the public to open the gates or pass across the railway. It appears to me the Plaintiff was clearly in the wrong in opening these gates and endeavouring to cross the railway. I do not mean that he has not his remedy if the statutory duty of the Company is not fulfilled, and a person in attendance to open the gates at fit and proper times. If he chooses to open the gates and take upon himself the risk of crossing the railway, he is not to be allowed to bring an action against the Company and recover damages. It seems to me the damage the Plaintiff incurred is too remote a consequence of the breach of duty on the part of the Company, and for which they cannot be held liable." Justices Crompton, Blackburn, and Shee concurred. Judgment for Company.—*Tried in Court of Queen's Bench, June* 6, 1865.—*From Law Journal Reports, vol.* 34, *page* 204.

610. *Lunn* v. *London and North Western Railway Company.*—Action for £100 for the death of a horse, injury to a second horse, and destruction of a cart, caused by a train running into them at a level crossing. The crossing was at Bank Quay, on the Mersey, between Warrington and Garston Stations. The railway crossed a public road diagonally. On one side, in addition to the gate across the public road, there was another gate which was a private entrance to Crossfield's storeyard. Thus on one side there was a single gate over the public road, and on the other side two gates, as before described. Access to

Crossfield's storeyard was across the level crossing at right angles to the opposite gate. The level crossing was thus a public road, and, as far as access to and from Crossfield's storeyard was concerned, a private road. On the 23rd November Plaintiff's carman had unloaded his lorry in Crossfield's storeyard, and had opened Crossfield's gate, and was about to cross the line. The opposite gate being nearly shut, he hailed the Company's gatekeeper, M'Grath, who was at his post, to know whether the line was clear. M'Grath, as Plaintiff's witnesses said, replied "Yes, come on." The carman started his two horses and cart, but as soon as they got on the line a train came up, and the accident occurred. The Company's witnesses maintained that M'Grath was calling to the driver of a luggage train to go on, and not speaking in answer to the carman. The case was tried before Justice Smith, at the Liverpool Summer Assizes, 1865, when the Jury returned a verdict for Plaintiff for £100. This was the second trial, and on both occasions the Jury found for Plaintiff. Leave was reserved to the Company to move to enter a verdict or non-suit if the Court should be of opinion there was no evidence to charge the Company with negligence. On the appeal case Justice Blackburn said—"I am of opinion that as to both points the rule should be discharged. The question of fact is whether the accident was attributable to the negligence of M'Grath, or whether Plaintiff's carman contributed to it by his want of caution. The Jury found that M'Grath said 'Yes, come on.' If that was so, M'Grath ought reasonably to have known whether the line was clear and safe, and he was guilty of negligence."

Justice Mellor said—"I am of the same opinion. The only real question is as to the construction of the statute 8 & 9 Vic., cap. 20 (Railway Clauses Act). Section 68 applies to private ways, and section 37 to public roads. Whether or not does the statute impose on railway companies the naked obligation of opening and shutting the gates when the line crosses a public road on a level? If the language of the section is not to be extended beyond its literal meaning, it would lead to a great absurdity, for the gates are to be kept constantly closed except when horses, &c., passing along the public road shall have to cross the railway; so that, literally, the Company's servants are

to open the gates and allow horses, &c., to cross the railway, without regard to whether they will be smashed to pieces or not by a coming train. The language must have a reasonable construction, and it is clear that it was meant that it was to be the duty of the gatekeepers to exercise their judgment as to whether it was safe or not to open the gates. It was then contended that, whatever might be the rule as to gates upon a public way, the same rule would not apply to gates upon a private way. Whether that be so or not generally, we are relieved from the inquiry in this case. Here is but one gate, under the control of the Company's gatekeeper, across both the public and private way. In my judgment they cannot diminish their obligation as to opening and shutting this gate, according to their judgment and discretion as to whether it is safe or not to do so, in the case of persons or cattle wanting to go to or from the private road only. I think the duty of the gatekeeper is the same in both cases." Justice Lush concurred. Judgment against Company.—*Tried in Court of Queen's Bench, February* 10, 1866.—*From Law Times Reports, vol.* 14, *page* 225.

611. *James* v. *Great Western Railway Company.*—Action for £200 compensation for injuries sustained owing to Plaintiff having been knocked down by an engine at a level crossing near Swansea. The Plaintiff was a labourer employed at Messrs. Dillwyn's spelter works near Swansea. Near these works there was a continuous level crossing over the Company's (Great Western) line and over the Swansea Valley railway, with a very small space between. Between 6 and 7 a.m. Plaintiff, with another man, was going to his work, and had to cross the level crossing footway. He had crossed the Swansea Valley main line and the Company's down line, but just as he stepped on the up line he was knocked down and severely injured by a pilot engine of the Defendants'. The engine was running tender first, and the evidence was contradictory as to any engine light being exhibited. The morning was dark and foggy, and there was smoke over the line, partly from the spelter works and partly from an engine that had just passed on the Swansea Valley railway. The man accompanying

Plaintiff passed over safely. The Swansea Valley engineman whistled, seeing the two men, and the pilot engineman whistled in reply, but this whistle was after the accident. The case was first tried at the Glamorganshire Assizes, before Baron Pigott, and Plaintiff obtained a verdict for £200 damages. The Company appealed, on the ground that there was no evidence of negligence on the Company's part to go to the Jury; and, if there was, they claimed a new trial, on the ground that the verdict was against the evidence.

On the appeal case Justice Willes said—"I concur with the Chief Justice (Bovill) there was evidence of negligence to go to the Jury. The Company were bound to use their right of working their line so as not, by any unreasonable exercise of such right, to interfere with the equal right of other persons. If there was anything which in reason they could do which would have avoided the accident, they were bound to do it. Was there, then, anything which they could have done which might have had that effect? There was, because notice might have been given by whistling, which might have attracted the attention of the Plaintiff and have saved him from being in the position he was when he met with the injury. It is not necessary to show that the precaution, if resorted to, would necessarily have had the effect of preventing the accident. All that is necessary, I think, to establish negligence is this—that there was a precaution which it was reasonable to resort to, and which, if resorted to, might by its ordinary effect have been the means of preventing the accident; and there was an omission to resort to such precaution." Justice Montague Smith concurred. Judgment against Company.—*Tried in Court of Common Pleas, Jan.* 30 *and Feb.* 4, 1867.—*From Law Journal Reports, vol.* 36, *page* 255.

612. *Skelton* v. *London and North Western Railway Company.*—Action by a widow for death of her husband, who was run over and killed by a passenger train at a level crossing 200 yards from Walsall Station. Several lines of railway ran across the road. The wicket gate was arranged to swing to, and a ring dropped over it at the top of the post, to fasten it when the railway could not be crossed by foot passengers. The ring

was worked by a lever from a signal box a few yards distant. Deceased, with a man named Bullard, came to the gate about 6 p.m., 14th January, 1867. There was a goods train standing across the road, and Bullard stated the ring was up and the gate free. They waited until the goods train was taken away, and then deceased attempted to cross the rails, when a passenger train on another line of rails knocked him down. He was called to, but, being deaf, did not take notice. The coming passenger train could not be seen owing to the goods train, and owing to the construction of the railway a person at the wicket gate could only see about 20 yards either up or down the railway. The case was first tried by Justice Blackburn, at Gloucester Assizes. The Judge directed a non-suit, but he asked the Jury whether, in their opinion, there was such negligence in the voluntary duty which the Company had taken upon themselves with respect to the closing of the wicket gates as to make that which was intended to be a protection a snare, and so occasioned the accident; and also whether they thought the deceased could, by reasonable care on his part, have avoided the consequences of that negligence of the Company. The Jury found a verdict for £500. Leave was reserved to set aside the non-suit, and to enter a verdict for the Plaintiff for that amount.

On the appeal case Chief Justice Bovill said—"In this case a non-suit was directed by Brother Blackburn, and I am of opinion the non-suit was right. Even assuming the ring was up when the deceased came to the gate, it could not have been an indication that the line was clear, for at that very time a goods train was standing there, so that he could not pass over, nor could he see the state of the line. He passed over the space where the goods train had been, and from *where* he could have seen about 300 yards of the line. It was clear that he did not then look, and that he was deaf and did not hear when he was called to. At the six-foot way he could have seen the line for a distance of 500 to 600 yards, and had he looked he would have seen the train; but from the time he left the gate it is manifest that he never looked right or left, but went straight on. It is only when the injury is caused by the negligence of the railway company that the action lies against them; and therefore, assuming that the ring was up and there

was negligence in this respect on the part of the Company, it appears that the accident did not arise from that, but from the deceased going along without looking to see what was on the line." Justices Willes and Montague Smith concurred.—*Tried in Court of Common Pleas, June* 7 *and* 8, 1867.—*From Law Journal Reports, vol.* 36, *page* 249.

613. *Cumberton* v. *The Irish North Western Railway Company.*—Action for personal injury, resulting from a train, when about a mile from a station called Dromore, running against some cows that were on the line; the carriage in which the Plaintiff and his wife rode was thrown off the line, and the wife was seriously hurt. It appeared cattle had got on the line through one of the gates of a private level crossing. Just at the place where the accident happened there was a cutting about 50 or 60 yards from the crossing, but the crossing could be seen at a distance of about 300 yards, and there was an incline of 1 in 150 at the spot. The private crossing was for the accommodation of a man named Wilson. The driver could not stop the engine in time.

On the first trial Justice Morris told the Jury that although the supervision to be exercised by the Company over a crossing such as that where the accident happened had to be of a very different nature from that to be exercised over a public crossing, still he did not think that the Company were entitled to say that they were relieved from all supervision over it.

The Jury found a verdict against the Company for £50 damages.

On the appeal case Chief Justice White said—"In discharging this case we decline to lay down any general abstract principle. Our Judgment rests upon the facts of a particular case, and upon the form of the objections taken. The objection taken was that no obligation lay upon the Company to exercise any supervision over the crossing, whereas we are of opinion that there must be a general supervision exercised over the whole line, and that this extends to private crossings as well as to every other part of the line. Now here better evidence has been given on the part of the Company than of the Plaintiff that in consequence of the Company not having

exercised such supervision the gate of this level crossing was open and unguarded just at the time a train was due, and that a man passing at the time drove some cattle on the line, and that the train coming by at the moment ran against the cattle. It was proved that the gate posts were broken, and the person entitled to the level crossing said that he knew nothing about keys. These circumstances, with others of a like nature, show that more supervision should have been exercised than was in fact exercised by the Company." The other Judges concurred. Judgment against the Company.—*Tried in the Court of Queen's Bench (Ireland), May 5*, 1869.—*From Irish Reports, Common Law, vol.* 3, *page* 603.

614. *Cliff* v. *Midland Railway Company.*—Action for personal injury at a level crossing at Mantel Lane, Leicestershire, to a girl ten years old, who was carrying dinner to her father, a working man at a neighbouring colliery. It was an *occupation road* which crosses the Company's line on a level. There were gates across the road left unfastened. The Company at one time kept a gatekeeper, but had ceased to keep one some time before the accident. About three years before the accident the Company had obtained powers under an Act to make a new road and discontinue the level occupation road. The powers of the Act were to be exercised within five years and then to cease, and nothing had been done to the road till after the accident. The Jury on the first trial negatived negligence in the driver of the engine of the train that knocked the child down, but found for the Plaintiff on the ground generally of "negligence as to the crossing." The Judge, in summing up, had left to the Jury as evidence of negligence in the Defendants the omission to keep a gatekeeper and the omission to exercise the powers of their Act. Verdict against the Company for £250.

On the appeal case Justice Lush said—"I think that the direction of the learned Judge is faulty, inasmuch as it leaves it open to the Jury to find a verdict against the Company either upon the ground that they had omitted to divert the road or on the ground that they had taken away the gatekeeper. There being no obligation arising out of the acts of

the Company, and no obligation imposed by their statute, I am unable to see any duty whatever, and if there was any duty the omission of what they were not bound to do cannot be a ground of complaint." A rule for a new trial.—*Tried in Court of Queen's Bench, February* 3, 1870.—*From Law Reports, vol. 5, page* 258.

615. *Patchell* v. *Irish North Western Railway Company.* —Action for personal injury, owing to a train coming in collision with two cows which were crossing the line between Dromore and Trillick. The carriage in which Plaintiff was seated received a severe shock, and was thrown off the rails and dragged a considerable distance, and Plaintiff sustained severe injuries, resulting from the accident. The level crossing led from a bog to the public road, and there was a stile at the side of the gate next the bog through which the country people were in the habit of passing. The Company originally had a watchman on this part of the line, but he had been withdrawn some time previous to the accident, and the keys of the gates given to the owner of the crossing. A public crossing and two other private crossings were situated within 500 yards from the place where the accident occurred. A female gatekeeper was employed by the Company at the public crossing. A witness said he saw no lock or key on or at the gate, and had frequently seen the gate without a lock; also that the post to which the gate should be locked was loose.

On the first trial, at Londonderry Summer Assizes, 1870, Chief Justice Monaghan non-suited the Plaintiff, with leave to appeal, and assessing the damages, if recoverable, at £75.

On the appeal case Chief Baron Pigott and Baron Deasy held that there was evidence of negligence on the part of the Company to go to the Jury. Baron Fitzgerald held that in the absence of any evidence that the gate was open in consequence of the looseness of the post, or of the post having been loose previous to the occasion, the Plaintiff was properly non-suited. Baron Hughes held that in the absence of evidence as to the nature or degree of the looseness of the post, or of the length of time during which it was loose, there was no evidence of negligence on the part of the Company to be left

to the Jury. The Court being divided in opinion, no order was made to set aside the non-suit, which amounted to a Judgment for the Company.—*Tried in the Court of Exchequer (Ireland), January* 27 *and* 28, *and February* 5, 1871.—*From Irish Reports, Common Law, vol.* 6, *page* 117.

616. *Wanless* v. *North Eastern Railway Company.*—Action for personal injury from being struck by a train at a level crossing. Plaintiff, a lad of fourteen years of age, came to the level crossing gate, north side, close to Hylton Station, between six and seven in the evening. Shortly before a horse and cart had passed over, and the gate on the north side had not been closed afterwards, and remained open when the lad came to the spot. There were also side gates for foot passengers. As the lad reached the railway a train was passing on the south rails, and he waited beside the north rails until it had passed, and then stepped on to the north rails to cross, when a train coming in the opposite direction on the north rails knocked him down and caused the injuries. The lad, from where he stood, could have seen the north train approaching for half a mile had he looked. There was a man in charge of the crossing, but he was on the south side of the gate, where his hut was located. The case had been tried in the Court of Queen's Bench, which gave a decision against the Company, and hence the Company now appealed to the Exchequer Chamber. Chief Baron Kelly said—"The only question before us is—Was there any evidence to go to the Jury of negligence on the part of the Company? The majority of the Court were of opinion that the gates should only be left open when no trains were expected, and that whenever the gates, or either of them, are left open, it is an intimation to the public who may have to cross the railway that they can pass in safety. I am far from saying that the circumstances proved at the trial were not evidence of contributory negligence; but we are not called upon to determine any question of contributory negligence. I cannot say that anyone crossing a railway ought not to look upon one side and upon the other to see whether a train is approaching." Barons Channell and Pigott concurred. Justices Smith and Byles also concurred. Justice Keating

said—"If there was no duty to shut the gates at the time in question, then I agree with my brother Bramwell that I see no evidence here of negligence on the part of the Company that could be said to contribute in any way to the accident. But it appears to me that it was the duty of the servants of the Company to have the gates shut at the time the two trains, or about the time the two trains, were passing." Baron Bramwell dissented from his learned brothers, and thought the Judgment should be for the Company. "It was said that the Company were under a duty to keep the carriage gates closed. I am of opinion that they were not under any absolute duty to do so. They are under a relative duty only. They are under a duty to keep them closed with the object which is stated in sec. 47 of the 8 Vic., cap. 20. They are to keep the gates closed except during the time when horses, cattle, carts, or carriages passing along shall have to cross the railway, and the gates shall be so constructed as, when closed, to fence in the railway and prevent horses or carriages passing along the road from entering along the railway. No horse or carriage being in sight along the road, it was unnecessary to keep the gates closed to prevent them from entering on the railway. What probably happened was that a cart had gone over the crossing, that the gatekeeper was on the side at which the cart had left the railway, that he shut the gate there, that he could not cross to the other gate on account of the train that had first passed on south side, and there being no immediate necessity to shut the gate, no other cart being in sight, it was left open, as the Plaintiff's witnesses say. Therefore there was no evidence of anything wrong, either wilfully or negligently. I am of opinion that the gate might properly be open if no cart or carriage or horse was in sight." Judgment against the Company, the majority of the Judges being against them.—*Tried in Court of Exchequer Chamber, May* 10, 1871.—*From Law Times Reports, vol.* 25, *page* 103.

The Company then appealed to the House of Lords, when Lord Cairns (Lord Chancellor) said—"This case may be useful if it leads to companies properly performing the duties cast on them by law of keeping gates at level crossings closed in times of danger. The only question raised in the case for our

determination is whether there was here evidence of negligence to go to a Jury. The circumstance that the gate was open at the time amounted to a statement to the public that the line was safe to cross, and a person going inside the gate with a view of crossing the line may well be supposed by a Jury to have been influenced by the fact that the gate was open. To say the boy might have seen the other train only comes to this, that being brought on to the line by the fact that the gate was open, and finding himself stopped by a train, he became embarrassed, and did not use his faculties as clearly as he might have done. The question is—Might not a Jury well consider that he was on the line through the negligence of the Company? It appears there was evidence that the Respondent was on the line in consequence of the gate being open, and I am of opinion that the question of negligence was rightly left to the Jury." Lords Chelmsford and Selborne concurred. Judgment against Company.—*Tried in the House of Lords, April* 20, 1874.—*From Law Journal Reports, vol.* 43, *page* 185.

617. *Rogers* v. *Rhymney Railway Company.*—Action for personal injury, whereby the Plaintiff's wife, while in the act of crossing the rails to a platform on the other side by a path which the Defendants had always allowed passengers to use for that purpose, was knocked down and killed by a train of the Company which had been suddenly, without any warning, driven backwards along the line of rails whilst she was crossing. This occurred at Walnut Tree Bridge Junction, where deceased got out and proceeded to cross over to the Taff Vale Railway platform, a distance of about 30 yards.

On the first trial the Jury returned a verdict of £150 against the Company, leave being given to appeal.

On the appeal case Chief Baron Kelly said—"I am of opinion our Judgment must be for the Plaintiff. I thought at the time the rule was granted that there was another way of crossing the railway by means of a bridge, and that it was not the practice for passengers to cross where the deceased did. Now, however, I find that there was a way where the deceased went across the rails actually made, and which had

been used for a long time. It was, in my opinion, properly left to the Jury by the learned Judge, whether passengers had used this crossing habitually, and whether deceased was lawfully on the spot where she met with her death. Both these questions the Jury answered in the affirmative. The next question was—Was she crossing at a proper time, and had the Company allowed her a reasonable time to cross? and this also the Jury found in favour of the Plaintiff. I think the verdict should not be disturbed, as there was sufficient evidence of negligence on the part of the Company to justify the Jury in finding as they have done." Judgment against the Company.—*Tried in the Court of Exchequer, June* 11, 1872.—*From Law Times Reports, vol.* 26, *page* 879.

618. *Oliver* v. *North Eastern Railway Company.*—Action for injury to a four-wheeled dogcart passing over a level crossing, in consequence of the rails being too high above the level of the road, whereby the hind wheels of the cart were caught by the rails and the carriage was torn in two. The Company contended that the level crossing had been constructed before any of the Company's special Acts of Parliament were passed; but this particular part of the railway was expressly mentioned in the Acts, and the Company contended that they were in the same position as if the level crossing had been originally constructed under the express sanction of an Act of Parliament, and that no duty was imposed on a railway company to keep in repair a public highway.

Justice Blackburn said—"It was held in *Rex* v. *Kerrison* (3 M. & S., 526) that where persons were authorised by statute to create what would otherwise amount to an indictable nuisance, such as making gates across a highway, they were bound, without any express enactment, to put and keep up for the public a proper substitute for the old way, such as a bridge. The principle of that case is expressly in point." The other Judges concurred. Plaintiff consequently retained the verdict for £20 given him by the Jury on the first trial.—*Tried in the Court of Queen's Bench, May* 8, 1874.—*From Law Reports, Queen's Bench, vol.* 9, *page* 409.

619. *Williams* v. *Great Western Railway Company.*—Action for £250 for personal injury to a child four years and

eight months old, whose foot was cut off by a train. The child lived with its parents three or four hundred yards from a level crossing over a carriage road, and thirty yards beyond the level crossing the line crossed a public footpath. There was no gate or gatekeeper at the level crossing nor stile at the footpath. The child had been sent on an errand to an adjoining house, and was shortly found crawling on the railway near the footpath with his foot cut off. The case was first tried at Denbigh, before Justice Keating, who directed a non-suit on the ground that there was no evidence of negligence on the Company's part. If the Court of Appeal should hold the Company liable, then the damages were assessed at £250. On the appeal case the Court held that the fact of the absence of a gate or stile at the footpath level crossing, and the fact of the Plaintiff being found injured there, were sufficiently connected to afford evidence for the Jury of liability on the part of the Company. The absence of gates and gatekeeper at the carriage road and stile at the footpath was a breach of the 8 Vic., cap. 20, secs. 47 and 61. Judgment against Company.—*Tried in Court of Exchequer, January* 24 *and April* 16 *and* 17, 1874.—*From Law Journal Reports, vol.* 43, *page* 105.

620. *Ellis* v. *Great Western Railway.*—Action for personal injury sustained at Bloomfield level crossing, where Plaintiff was knocked down by a train. Plaintiff approached the crossing about 9.30 p.m. on a dark night, December 17, 1871. The Bloomfield crossing is near Tipton, and the railway runs between Wolverhampton and Dudley. On getting to the gate Plaintiff heard a down train coming, and waited until it had passed; he then walked over the down line, and was in the centre when the engine of a train going on the up line to Dudley struck him on the left arm, knocked him down, and he said his leg was smashed flat. Plaintiff deposed there was no light or gas to light the crossing, and he saw no light on the engine or train by which he was knocked down. The road gates were both locked, and only the wicket gates open for foot passengers. The crossing man deposed that Plaintiff was tipsy and staggering, and he called out to him

for God's sake to keep back, as the up train was coming; he had his lamp in his hand, and could see the Plaintiff seven or eight yards off. The case was first tried before Justice Grove, at Stafford Summer Assizes, 1872, when the Judge directed the Jury there was some evidence of negligence for their consideration. A verdict for £350 was given. The Company appealed, and on the appeal case four Judges—Bramwell, Mellor, Pollock, and Amphlett—held there was no evidence of negligence, while Chief Justice Cockburn and Baron Cleasby held there was. Baron Bramwell said—"I am of opinion there should be a *venire de novo* in this case. I think there was no evidence to go to the Jury. In my judgment, the railway being straight, things on it visible for a quarter of a mile in one and half a mile in the other direction, nothing to impede the view or make a difficulty for the foot passengers crossing the line, nothing was necessary to be done by the Company. The sight and sound of the approaching trains were enough warning. I think that proper precautions are not negatived here by the evidence." Judgment for Company.—*Tried in Court of Common Pleas, May* 11 *and June* 24, 1874.—*From Law Journal Reports, vol.* 43, *page* 304.

WHERE A RAILWAY COMPANY ISSUES A THROUGH TICKET, AND A THROUGH CONTRACT IS THEREBY MADE, AND THE CONTRACTING COMPANY IS OR IS NOT RESPONSIBLE FOR PERSONAL INJURY TO PASSENGERS ON THE RAILWAYS OF OTHER COMPANIES.

	Case No.		Case No.
Blake v. *Great Western* (1862) ...	621	*Thomas* v. *Rhymney* (1871) ...	624
Ayles v. *South Eastern* (1868) ...	622	*Wright* v. *Midland* (1873)... ...	625
Buxton v. *North Eastern* (1868)	623	*Burke* v. *South Eastern* (1879) ...	626

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621. *Blake* v. *Great Western Railway Company.*—Action for personal injury. On 2nd December, 1859, Plaintiff, a passenger through-booked from London to Milford Haven, was in a train which, after passing Gloucester, came in contact with a locomotive engine on the South Wales Railway. The engine had been negligently left in the way. There was no

negligence proved by those driving the train. The Company contended there was no negligence on their part, and they were not liable; and that the carriage of passengers was different to the carriage of goods, and that in the former case they were not insurers. The case was tried before Baron Martin, and a verdict given for Plaintiff. The Company appealed to the Court of Exchequer Chamber, when Chief Justice Cockburn gave Judgment. He said—"I am of opinion the Judgment should be for the Plaintiff. It has been settled by the authority of several cases that when a company makes a contract for the conveyance of goods extending over other lines, the company so contracting is liable for loss on the other lines, and I think that that principle applies in the case of passengers as well. I think the contracting company incurs all the responsibilities and liabilities, the same as if the contract were confined to the company's own line. The company are bound to maintain their line in proper condition, and to use due and reasonable care." Justices Wightman, Crompton, Byles, Keating, and Mellor concurred.—*Tried in the Exchequer Chamber, February* 10, 1862.—*From Law Journal Reports, vol.* 31, *page* 346.

622. *Ayles* v. *South Eastern Railway Company.*—Action for £80 for personal injury arising from a collision. Plaintiff was a passenger, Deptford to Charing Cross. When the train in which he travelled approached Cannon Street Station, it was stopped outside the station, waiting for "Line clear," and another train (owner not specified) ran into the standing train, and Plaintiff was hurt by the collision. The Company contended that other companies besides themselves had running powers over this line. Plaintiff offered no proof as to how the accident happened, nor as to whether the offending train belonged to the Company or was under their control. The case was first tried before Chief Baron Kelly, London Sittings after Hilary Term, 1867, when the Jury gave a verdict for £80 in favour of Plaintiff. The Company appealed, and on the appeal case Chief Baron Kelly said—"I am of opinion that it is to be presumed, in the absence of evidence to the contrary, that the offending train either belonged to the Company, who are owners of the

railway, or was under their direction and control. A railway company is responsible for the safe conduct of trains within its own premises, and in case of collision there is *primâ facie* a case of negligence against the company, who have the control over them. It is contended that where there are 'running powers' there is nothing to show that the train which did the mischief does not belong to one or other of them. The owning company alone know to whom any particular train belongs, and the times and other regulations of its running must be fixed by arrangement with them. I thought on the first trial the evidence of negligence was slight, but it was for the Jury to say whether the accident might have been prevented." Barons Martin and Pigott concurred. Verdict against Company.—*Tried in Court of Exchequer, April* 28, 1868.—*From Law Reports, Exchequer, vol.* 3, *page* 147.

623. *Buxton* v. *North Eastern Railway Company.*— Action for personal injury. Plaintiff took a second class ticket, York to Tamworth. When the train was within a mile of Eckington Station, on the Midland Railway, it came into collision with a bullock that had strayed on the line, and Plaintiff was injured. The bullock had forced its way through a quick-set hedge strengthened by posts and rails. A post, found to be decayed at a part below the ground, yielded to the weight of the bullock and broke. The fences had only been lately repaired where observed to be defective. The Company contended the accident occurred on the Midland line, and they were not liable; and that reasonable care was taken, and no evidence of negligence. The case was first tried before Chief Baron Kelly, Staffordshire Spring Assizes, when the Jury gave Plaintiff a verdict for £800. The Company obtained a rule to enter a non-suit on the ground there was no evidence of negligence which ought to have been left to the Jury, or for a new trial on the ground of misdirection in the Judge having directed the Jury that it was negligence in the Company if the fences proved insufficient, and that the breach of the statutory obligation to maintain fences was evidence of negligence. Justice Blackburn gave Judgment. The case of *Blake* v. *Great Western* settled the point that the company issuing the ticket

are responsible, as the contracting company, for accidents on the other company's lines. He held that the Railway Clauses Act, 8 Vic., cap. 20, sec. 68, imposes no duty on a railway company *towards their passengers* to keep up the fences, and that a railway are not bound at common law to maintain fences sufficient to keep cattle off the line under all circumstances, but are bound to use every reasonable care to prevent them straying on to the line. Judgment for Company, granting a rule for a new trial.—*Tried in Court of Queen's Bench, June* 16, 1868.—*From Law Reports, vol.* 3, *page* 549.

624. *Thomas* v. *Rhymney Railway Company.*—Action for personal injury. Plaintiff took a ticket from Caerphilly to Cardiff. The Company's line ended at Llandaff, from which junction they had running powers over the Taff Vale Railway. Llandaff Station was worked by the Taff Vale Company. Three minutes before Plaintiff's train reached Llandaff the station-master there had sent forward an engine and tender belonging to the Taff Vale Company without a proper tail light. Plaintiff's train was sent on, and came into collision with the engine and tender, which led to the personal injury. The Company contended there was no negligence on their part, and that they were not liable for what occurred on a line not their own. The case was first tried by Chief Baron Kelly, at the Glamorganshire Spring Assizes, 1869, when the Jury gave a verdict for the Company, with leave to Plaintiff to appeal to enter a verdict for £450 if the Court above should hold the Company were responsible for the negligence of the Taff Vale Company. An appeal was then taken to the Queen's Bench, where the verdict was against the Company, who now appealed to the Exchequer Chamber. On the appeal case Chief Baron Kelly said—"Independently of the decision of *Great Western Company* v. *Blake*, where a railway company issues a ticket for a journey in the course of which the train which conveys the passenger has to pass along a portion of a line of railway belonging to another company (whether it be under running powers, or whether it be under any particular contract for a participation in profits or otherwise), the contract between the railway company and the traveller to whom such ticket is issued is, upon

every principle of law, a contract, not only that they will not themselves be guilty of any negligence, but that the passenger shall be carried with due and reasonable care along the whole line from one end of the journey to the other." Judgment against Company.—*Tried in Court of Exchequer Chamber, Feb.* 4, 1871.—*From Law Reports, Q.B., vol.* 6, *page* 266; *see also Law Journal Reports, vol.* 39, *page* 141.

The Company appealed to the Exchequer Chamber, Feb. 4, 1871, where it was held that Defendants were liable for the negligence of the Taff Vale Railway Company, and the Judgment was affirmed.—*From Law Journal Reports, vol.* 40, *page* 89, *Q.B.; also Law Times Reports, vol.* 24, *page* 145.

625. *Wright* v. *Midland Railway Company.*—Action for personal injury. Plaintiff, on 29th August, 1871, took a ticket at Leeds for Sheffield, and proceeded by the train. Between a quarter and half a mile outside the Company's Leeds Station is Leeds Junction, where the Company have a signalman. Three companies (the Defendants, the London and North Western, and the North Eastern) run over the Leeds Junction to get to and from the two Leeds stations. When Plaintiff's train was about half-way over the Leeds Junction, it was run into by a London and North Western Company's train. The signalman (a Midland servant) gave the driver of the London and North Western Company a signal that he was not to advance to the junction, but this signal was not obeyed, hence the accident. Plaintiff contended he contracted with the Midland Company for safe transit. The Company contended the injury did not arise from any negligence on their part. The case was first tried at the York Summer Assizes, 1872, before Baron Cleasby, who asked the Jury whether, in their opinion, the collision was attributable to the negligent management of the train by the servants of the Defendants, and directed them that if they thought the collision was caused by the negligence of the driver of the London and North Western Company's train in not attending to the signals, the Defendants would be entitled to the verdict; reserving leave to the Plaintiff, in that event, to move to enter the verdict for him if the Appeal Court should be of opinion the Defendants were

liable. The Jury found the Defendants not culpable, and assessed the damages at £200 if the Appeal Court should hold that the Defendants were responsible for the negligence of the driver of the London and North Western Company's train.

On the appeal case Baron Bramwell said—"If this had been a case of goods damage, the Defendants would have been liable, because they would have been insurers. But here they contract no further than that all persons connected with carrying (of passengers) and with the means and appliances of carrying —with the carriages, the road, the signalling, and otherwise— shall use care and diligence so that no accident shall happen. If they were to contract that everybody should use care and diligence, their duty would extend to strangers. They have no contract that strangers to the railway (if one may use such an expression) shall do nothing wrong, either by wilfulness or negligence. It is said to be a very convenient thing that the Plaintiff should be able to sue those undertaking to carry him, and should not be driven to inquire who it was that injured him and bring his action against that person. But that is really an argument that it is very convenient to be unjust. It is admitted that if the London and North Western Company had been trespassers this action would not be maintainable, but it is said because they have a right to be there, there is some obligation on the part of the Defendants with relation to them which makes the Defendants liable. Now I think there is such an obligation, but only to this extent, that the Defendants are bound to use due and reasonable care that the London and North Western Company shall not run into them, and shall do nothing to make the road or the Defendants' carriages unsafe. But the Defendants did their duty in this, for they signalled to the London and North Western train not to come on. A railway is a public highway upon which everybody with properly arranged engines and so forth has a right to go. What would happen if anybody using the line in that way had, under those powers, done this thing? Would any liability attach to the Defendants? On this illustration they would be liable simply because somebody else having the right to use the same road had run into them. If that is so, it would follow that if an omnibus ran into a cab the cab proprietor would

be liable for the damage done." Baron Cleasby and Baron Pollock concurred. Judgment for Company.—*Tried in Court of Common Pleas, January* 29 *and* 30, 1873.—*From Law Journal Reports, vol.* 42, *page* 89.

626. *Burke* v. *South Eastern Railway Company.*—Action for £200 for personal injury received on the Great Northern Railway of France. Plaintiff took a coupon return ticket, London to Paris and back. One of the conditions printed in the book of six coupons was—

"Each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being booked to travel over the railways of other companies."

The case was first tried before Chief Justice Cockburn, at Westminster Hilary Sittings, 1879. The Judge left it to the Jury to say whether the Company had reasonably brought to the knowledge of the Plaintiff the conditions of the contract. The Jury decided against the Company on this point, and gave a verdict for £200. The Company appealed, and on the appeal case Lord Coleridge said:—"I will assume, however, that the Plaintiff neither read the condition nor knew of its existence, whether I think that that is a probable or an improbable supposition. Then comes the question—Does that afford any answer to the Company's plea? In my opinion it affords none. The contract, as I understand it, is simply this little book or ticket, and the whole of this little book. This is the contract, and the terms contained in it are the terms upon which the Company agreed to carry Plaintiff. I agree that the case of *Henderson* v. *Stevenson*, tried in the House of Lords, would be in point and binding upon us, if the House of Lords had come to the conclusion that in a piece of paper like this the whole of the contract was limited to the first page out of these ten or twelve pages. In the case of *Henderson* v. *Stevenson*, on the same side of the card (ticket) on which 'Dublin to Whitehaven' was printed, there was no reference at all to the other side, and it was said that the one side only formed the contract because there was no reference whatever to the other side upon it; and the Jury found that the Plaintiff assumed, and had a right to assume,

that the one side of the card contained the whole of the contract. If page 1 and also pages 3 to 11 of the coupon book form part of the contract, on what ground is page 2 to be rejected? This is part of the printed terms, which, by the ordinary use of his eyesight, the Plaintiff might have seen. What we are virtually asked to decide is in favour of the Plaintiff, because on the first page of the coupon book there is not printed in large letters 'Read the next page.'" Justice Lindley said—"In *Henderson and Stevenson's Case*, the House of Lords, in substance, split the ticket in two, and said that there was room to hold that the one side only formed the contract. To my mind it is quite impossible that the ticket, in this case, could be dealt with as the ticket was in *Henderson* v. *Stevenson*, and the Plaintiff, therefore, cannot repudiate one part of this contract and claim the benefit of the other part of it." Judgment for Company.—*Tried in Court of Common Pleas, November* 26, 1879.—*From Law Times Reports, vol.* 41, *page* 554.

ACTIONS WHERE PASSENGERS, AFTER ACCEPTING COMPENSATION FOR PERSONAL INJURY, SUE FOR FURTHER COMPENSATION.

	Case No.		Case No.
Roberts v. *Eastern Counties* (1859)	627	*Lee* v. *L. & Y.* (1871)...	630
Stewart v. *Great Western* (1865)	628	*Bradburn* v. *Great Western* (1874)	631
Read v. *Great Eastern* (1868) ...	629		

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627. *Roberts* v. *Eastern Counties Railway Company.*—Action for personal injury which occurred owing to an accident at Bromley Station. Owing to an error in turning the points, a portion of a train got on one line of rails and the remainder on to another. The train was overturned, and the hat of the Plaintiff crushed. He was not aware at the time that he had been seriously injured, and on arrival in London the station-master suggested that he should have some remuneration for his spoilt hat, and gave him £2, for which he signed a receipt. Plaintiff subsequently found he had been seriously injured, being nervous and sleepless, light-headed, vomiting, &c., and

was obliged to leave business. He had lost his memory, and was unable to resume his employment.

Chief Justice Cockburn said—"It surely cannot be seriously urged that if the Plaintiff has been seriously injured he is precluded from recovering because he accepted £2 for his hat." Verdict, £250 damages against the Company.—*Tried at Nisi Prius, Hilary Term*, 1859.—*From Foster and Finlason's Nisi Prius Reports, vol.* 1, *page* 460.

628. *Stewart* v. *Great Western Railway Company.*—Action for personal injury. On 3rd August, 1864, Plaintiff and his wife were passengers on Defendants' railway from Crumlin to Worcester in an excursion train. A collision occurred at Pontypool, when Mrs. Stewart's leg was broken, and Plaintiff received injuries in his head, chest, and back. Three doctors attended, and prevailed upon Plaintiff to accept £15 for compensation, and to sign a receipt in full of all sums that might be claimed by them for damages. Plaintiff professed he did not know at the time what he afterwards discovered—that these gentlemen were employed by the Company as agents to settle, and that he had been deceived, the amount of compensation being grossly inadequate. Plaintiff commenced an action for £1,700 damages, to which the Company pleaded not liable and the receipt of the £15 in full satisfaction. Plaintiff then brought the case into the Court of Chancery (Vice-Chancellor Kindersley's Court) to restrain the Company in equity from pleading the receipt of £15 as full satisfaction to his claim for damages. Vice-Chancellor Kindersley said—"This Court will prevent that instrument (the receipt) being used as an impediment to the recovery by Plaintiff of such damages as he may be entitled to, supposing that instrument had never been executed. Now, in the case of a corporation like this, the body of the directors may be supposed to have no cognisance of the details of this transaction more than a stranger; and on that ground I apprehend it would be impossible to make out that this was a fraud committed by the Company so as to prevent them from setting up the instrument so obtained. But, with regard to equitable fraud, a Court of Equity will take into account all the circumstances of the case

—not only the act and intention of the party, but the circumstances under which the act was done, the position of the party who is said to be imposed on, his being *inops consilii*, his being in a state of bodily and therefore mental weakness, and so on. *Non constat* that these are sufficient to constitute legal fraud." Judgment against the Company. The Company then appealed to the Lord Chancellor, who said—"An instrument has been unfairly obtained, which is an impediment to the Plaintiffs succeeding in an action. The Plaintiffs have a right to have that instrument taken out of their way, and they are under no obligation to forsake the tribunal to which their cause of action properly belongs, and where they are already suitors to transfer that cause of action in its entirety to this Court as the price of this Court's interference. This Court can most legitimately and effectually interfere by restraining the Company from obtaining any benefit from that instrument. I think the Court is bound, if the case be proved as it is now alleged, to exercise that jurisdiction; and on these grounds, therefore, without giving any opinion upon the grounds assigned by the Vice-Chancellor, I overrule this demurrer and dismiss the petition of re-hearing, with costs." Judgment against Company.—*Tried in the Court of Chancery, before the Lord Chancellor, on appeal, July* 1, 1865.—*From Law Times Reports, vol.* 13, *page* 79.

629. *Read* v. *Great Eastern Railway Company.*—Action by the widow of D. Read for her husband's death, arising from a collision on the Company's railway. Deceased before his death had received from the Company a sum of money in full satisfaction and discharge of all the claims and causes of action he had against the Company for said accident. Plaintiff contended that the death of her husband created a new ground of action, and that the compensation he had accepted was for injuries not at the time expected to produce death. Justice Lush said—"The intention of the 9 & 10 Vic., cap. 93, was not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim, *Actio personalis moritur cum personâ*, would have applied. It only points to a case

where the party injured has not recovered compensation against the wrongdoer. It is true that section 2 provides a different mode of assessing the damages, but that does not give a fresh cause of action." Judgment for Company.—*Tried in Court of Queen's Bench, June* 25, 1868.—*From Law Reports, vol.* 3, *page* 555.

630. *Lee* v. *Lancashire and Yorkshire Railway Company.*—Action for £3,000 for injury to the spinal cord of Plaintiff, resulting from a collision at Miles Platting on September 25, 1865. Plaintiff was a civil engineer, and first made a claim for £650 shortly after the accident. He was seen by his own doctor, the Company's doctor, and a third doctor who was considered an independent doctor. On the 18th October Plaintiff agreed to accept £400, and the Company to pay £50 for doctors' bills; and Mr. Blackmore, the Company's passenger superintendent, paid the money and obtained the following receipt:—

"Received from the Lancashire and Yorkshire Railway Company the sum of £400, in discharge of my claim in full upon that Company for all loss sustained and expenses incurred by the late accident at Miles Platting, September 25, 1865, including all expenses attending the same."

In July, 1866, Plaintiff became materially worse, and for a time lost the power of speech and hearing, and, although he recovered these, he was incapacitated from practising his profession. Plaintiff made a further claim on the Company, which was declined. He was then legally advised that the receipt he had given would at law bar his claim. It appeared when he received the money from Mr. Blackmore he did so upon the express condition—assented to by Mr. Blackmore—that he should not thereby preclude himself from further compensation if his injuries should prove to be of a more serious character than they were then believed to be. Plaintiff was advised to take the case into the Court of Chancery for an injunction to prevent the Company pleading the receipt as a final settlement of his claim. The Vice-Chancellor thought the Plaintiff was not, when he gave the receipt, competent to treat for himself, or, if he was, he ought to have had other than mere medical assistance. Costs of suit given against Company. Against this decision the Company now appealed to the Court of Chancery in Equity.

Lord Justice Mellish, in giving Judgment, said—"Plaintiff alleges that before he can properly try his case in the Court of Law the plea which has been set up (against him) ought to be set aside, that plea being in form a common plea of payment and receipt of a sum of money in satisfaction of Plaintiff's claim. I am of opinion that if he received such advice it was wrong advice, and that if the circumstances stated in his bill are correct he had a full and complete answer at law to this plea; and it appears to me that the supposition that it is necessary to come into a Court of Equity for the purpose of setting aside the plea is founded on a total mistake as to what is the effect at law of signing a receipt. I had some little doubt in the course of the argument whether it might not be said that this document amounted to an agreement, in which, no doubt, the rule of law would apply that if the parties had reduced their agreement into writing they could not vary the terms of that agreement by parol evidence; but, on looking at the document, I am convinced it is simply a receipt. It simply states the fact; it does not state an agreement, or purport to bind either of the parties to any terms whatever. It simply acknowledges that a sum of money was received, and then states in respect of what it was received, viz., in satisfaction of the damages the Plaintiff had sustained in this collision. Then what he says is this—'True it is that I signed that receipt, but I asked the agent of the Company in plain terms before I signed it, Will this receipt prevent my recovering further damages if the doctors' opinion turns out to be wrong and I don't get well? The Company's agent told me it would not, and I signed the receipt on the faith of that statement.' I am very clearly of opinion that if that is a true statement, and if the Jury believe it, he (Plaintiff) would have a perfect answer to this plea, not necessarily on any replication of fraud, but on any replication traversing the plea denying that he had received the money which was paid him in (full) satisfaction and discharge. Where a receipt has been given under seal it discharges the cause of action altogether, and it can only be set aside in a Court of Law on what is called the equitable jurisdiction of Courts of Law, which in certain circumstances they can exercise. But a receipt not under seal has no such effect at all;

it simply amounts to an acknowledgment. It has the same effect at law as if a man had written a letter saying he had received a sum of money in satisfaction, or as if in course of conversation he had mentioned he had received it in satisfaction. In my judgment Plaintiff does not want the assistance of a Court of Equity; I think he will not be held to be bound by it (the receipt) at law, and it is a great pity that this case did not go down to be tried at law before a Jury in the year 1866. I think, therefore, the decree of the Vice-Chancellor must be reversed." Lord Justice James concurred. This Judgment was practically against the Company, because it cleared the way authoritatively for a trial at law before a Jury. —*Tried in Court of Appeal in Chancery, April* 17, 18, *and* 19, 1871.—*From Law Times Reports, vol.* 25, *page* 77.

631. *Bradburn* v. *Great Western Railway Company.*— Action for personal injury arising from an accident on the railway. It appeared the Plaintiff had received £31 from an Accidental Office, and the Company disputed the claim. The case was first tried at the Stafford Summer Assizes, before Baron Pigott, when the Jury gave Plaintiff a verdict for £217 damages. The Company appealed to reduce this sum by £31, on the ground that in the case of *Hicks* v. *Newport Abergavenny and Hereford Railway Company* (4 B. & S., 403) Lord Campbell directed the Jury to deduct from the aggregate amount of damages a certain sum paid to the Plaintiff upon an accident policy by an Insurance Office, and also the premiums that would have been payable upon a life policy had the life continued. Baron Pigott said—"I am of opinion the Judgment must be against the Company. The Plaintiff is entitled to recover the amount of damages which the Company have caused him by their negligence, and there would be no justice nor principle in setting off against the damages a sum to which he is entitled under the contract that he, as a prudent man, made in anticipation of calamity. He pays premiums, and the agreement with the Insurance Office is that so soon as he shall meet with an accident he shall receive a certain sum of money. It is because he is *damaged* that he gets it, and it is paid him by reason of his contract." Baron Bramwell and Baron Amphlett

concurred. Judgment against Company.—*Tried in Court of Common Pleas, November 5*, 1874.—*From Law Journal Reports, vol.* 44, *page* 9.

RAILWAY COMPANIES' SERVANTS AUTHORISING MEDICAL OR OTHER EXPENSES IN CONNECTION WITH PERSONS INJURED BY RAILWAY ACCIDENTS.

	Case No.		Case No.
Cox v. *Midland* (1849)	632	*Langan* v. *Great Western* (1872)	634
Walker v. *Great Western* (1867)	633	*Montgomery* v. *N. B.* (1878) ...	635

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632. *Cox* v. *Midland Railway Company.*—Action by a surgeon for professional charges for amputating the leg of one Higgins, a labourer, who had met with an accident from the moving of a truck on the Company's line. The railway guard applied to Mr. Davis, the nearest surgeon, who required the services of Plaintiff, an eminent hospital surgeon. The Birmingham station-master told Mr. Davis's son that every attention should be paid to the injured man. Plaintiff amputated the leg, and the Company declined to pay, denying their liability. The case was first tried before Justice Maule, at the Warwick Spring Assizes, when the Company contended (1) that, being a corporation, they could only be bound by a contract under their seal; (2) that it was not incident to the employment of a station-master to enter into contracts of such a character. The Judge directed a verdict for Plaintiff, with leave to the Company to appeal to enter a non-suit. On the appeal case Baron Parke said—"We are of opinion the power to enter into the contract (with the surgeon) was not incident either to the employment of the guard or station-master. There was no evidence of an authority, in the present case, being given to any but the directors, who possessed, by statute, the management of the affairs of the Company. Though it might be a benefit, in such a case, to the master to have the damage diminished by a speedy cure, if he was really liable for that damage, it would, however, be a prejudice to him to be bound to pay if he was not; and is the servant to decide whether his master is liable or not? The employer of an agent

for a particular purpose gives only the authority necessary for that agency under ordinary circumstances. The employment of an agent gives also the power usually exercised by similar agents, but there was no evidence of usage in this case. We think, therefore, the Company are not liable, whether we suppose the railway guard or the station-master at the station to be the person making the contract." Judgment for Company.—*Tried in Court of Exchequer, December* 8, 1848, *and January* 17, 1849.—*From Law Journal Reports, vol.* 18, *page* 65.

633. *Walker* v. *Great Western Railway Company.*—Action for £44 16s. for medical attendance upon a Company's servant (Jones) injured in an accident, whose leg had to be amputated. The case was first tried before Baron Pigott, at Worcester Assizes, when a verdict was given against the Company. The Company appealed. It appeared that Mr. Adcock, general manager, on hearing of the accident, telegraphed one of his station-masters to "employ as good medical assistance as the neighbourhood would afford." No express authority to engage medical attendance was proved to have been given to Mr. Adcock by the Company. The Company contended that neither the station-master nor the general manager had any authority to bind the Company by engaging medical attendance. Chief Baron Kelly said—"If the general manager has no authority in such case, no official of the Company has. Must a board be convened before a man who has both his legs broken can have medical assistance?" The Company contended that the case of *Cox* v. *Midland Railway Company* shows there was no implied authority in such a case. Baron Martin said—"At the time that case was decided the notion prevailed much more extensively than at present that a Company could not be bound except by an instrument under seal." The Court, being of opinion that the general manager of the Company had, under the circumstances of the case, authority to bind the Company, gave Judgment against the Company.—*Tried in Court of Exchequer, April* 18, 1867.—*From Law Journal Reports, vol.* 36, *page* 123.

634. *Langan* v. *Great Western Railway Company.*—Action for £90 for board and lodging at an inn, given to two

passengers injured at a railway accident. One of the sufferers was taken to the inn near Great Bridge Station by the Company's servants, the other sufferer by a fellow-passenger. Shortly after their arrival a Company's inspector, whose duty it was to attend accidents, called and saw the sufferers, and one said, "Who will pay these good people?" The inspector replied, "Don't trouble yourself about that, we will see that all right; you are too ill to trouble about it." Plaintiff (the landlady), relying upon this conversation, continued to supply the sufferers' requirements until they recovered. The case was first tried at Stafford Assizes, 1871, when a non-suit was entered, with leave to move to enter a verdict instead thereof for £90, on the ground that there was evidence which ought to have been left to the Jury in support of the Plaintiff's case. On the appeal case, Chief Justice Cockburn and Justices Lush and Quain held that the Company's inspector, being a person whose business it was to attend accidents, must be taken as a person authorised to pledge the Company's credit in such a case. Judgment against Company.—*Tried in Court of Queen's Bench, May* 1, 1872.—*From Law Times Reports, vol.* 26, *page* 577.

635. *Montgomery* v. *North British Railway Company.*—Action for £44 14s. for seventy-five professional medical visits and medicine to a goods guard, who had sustained an accident to his left foot, at Ayton, eight miles from Berwick, while shunting waggons. When the accident occurred, the station agent at Ayton (Tule) sent for Plaintiff (Dr. Montgomery), who went with the guard to Berwick, and continued his attendance at Berwick from March 21 to July 15, passing free by railway backwards and forwards. The case was first tried before the Sheriff Substitute of Berwickshire, who gave Judgment for the Company (North British Railway). Plaintiff then appealed to the Chief Sheriff, who gave Judgment against the Company. The Company then appealed to the Court of Session (First Division), when the Lord President said—"It is made a question of dispute whether Plaintiff was informed of the rule of the Company, as follows:—

'In case of a doctor being sent for *by a servant* of the Company to attend *any person* who may have sustained injury by accident upon the railway, the

Company will be responsible for the doctor's fee in respect of his first visit only, and station agents and others will be held responsible for making the doctor acquainted with this regulation.'—*Article* 8, *Rules and Regulations to be observed by the Officers and Servants of the North British Railway Company.*

The injured man, and another person who lodged in the same house, both swear they made the doctor aware of it, and the doctor himself is not very distinct in his denial. It is not contended the doctor received employment from anybody else except Tule. It is implied that Tule authorised him to travel by railway every day, and thus pay seventy-five visits. It appears to me utterly out of the question to suppose that any station-master can have an implied authority to employ a medical man to that extent and for that purpose, and upon that ground I think it quite clear that the Sheriff Substitute is right, the Sheriff Principal wrong."

Lord Deas and Lord Mure concurred.

Lord Shand also concurred, and said—"The station-master, under his ordinary employment as such, was certainly not an agent of the Company entitled to employ a doctor to give continuous attendance, either to a servant of the Company or a passenger. A provision or direction to give an intimation of precaution (to the doctor), to prevent any possible misunderstanding, cannot be interpreted as extending the power of the agent who fails to give intimation; and I cannot see how the failure to give intimation can infer liability against the Company, who were not bound to give it." Judgment for Company.—*Tried in Court of Session (First Division), Edinburgh, May* 16, 1878.—*From Scottish Law Reporter, vol.* 15, *page* 557.

PERSONAL INJURY RESULTING IN DEATH WHERE SURVIVORS CAN AND CANNOT RECOVER COMPENSATION.

	Case No.		Case No.
Franklin v. *S. E.* (1858)	636	*Birtles* v. *L. & N. W.* (1877) ...	639
Rowley v. *L. & N. W.* (1873) ...	637	*Horn* v. *N. B.* (1878)	640
Sykes v. *N. E.* (1875)...	638	*Bourke* v. *Macroom Railway* (1879)	641

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636. *Franklin* v. *South Eastern Railway Company.*—Action for personal injury. The deceased was injured in a

collision which took place on the Company's line between Gravesend and London, which led to his death. Deceased, the son of the Plaintiff, was porter to a saddler at the wages of 23s. per week. The Plaintiff (the father) was a light porter at St. Thomas's Hospital, which situation he had held for 32 years. Plaintiff was in the habit of carrying up coals to the wards of the hospital, for which he was paid 3s. 6d., but in consequence of illness the deceased had for some time carried up the coals for his father.

The Company submitted that the Plaintiff had sustained no damage by the death of the deceased which entitled him to maintain the action. The Judge left it to the Jury whether the Plaintiff had a reasonable expectation of any, or what, pecuniary benefit of a continuance of his son's life. The Jury found a verdict against the Company for £75.

On the appeal case it was held that the action was maintainable, but, as on any view the damages were excessive, there must be a new trial, unless the parties can agree to abate them. *Tried in the Court of Exchequer, May* 7, 1858.—*From Hurlstone and Norman's Exchequer Reports, vol.* 3, *page* 211.

637. *Rowley* v. *London and North Western Railway Company.*—Action for personal injury. The deceased was an attorney at Manchester, and by articles of partnership, dated in the year 1853, between his father and himself, he covenanted that he would, during the joint lives of himself and his mother, pay her an annuity of £200 a year. He was forty years of age at the time of his death, and his mother was then sixty-one. One J. Adamson, an accountant, gave evidence that according to the "Carlisle" tables, which showed the average duration of human life, the probable number of years the deceased might have lived, but for the accident, was twenty-seven, and that this should be taken into account in estimating the damages. The Jury assessed the damages at £6,200, apportioning £1,200 to the mother, £1,400 to the wife, and £600 to each of the children.

On the appeal case it was held that the Jury should not be directed to give damages to the full amount of a perfect compensation for the pecuniary injury, but that they should

take a reasonable view of the case and give what they considered, under all the circumstances, a fair compensation. Justice Honeyman said—"Having come to the conclusion that on these grounds there must be *venire de novo*, I purposely abstain from expressing any opinion on the other exceptions to the Lord Chief Baron's ruling, and to the admissibility of Mr. Adamson's evidence." Judgment accordingly.—*Tried in the Court of Exchequer Chamber, June* 26, 1873.—*From Law Reports, Exchequer, vol.* 8, *page* 221.

638. *Sykes* v. *North Eastern Railway Company.*—Action by a father for death of his son. Both were bricklayers. Seth, the son, was one day at Castleford Station unloading bricks out of a railway truck standing on a siding. A goods train was backed into the siding, struck the truck and knocked Seth out of it, and he was run over by the goods train, and suffered injuries from which he died. The father claimed compensation under 9 & 10 Vic., cap. 93, Lord Campbell's Act. Seth was single, and lived at home with his father; his father paid him 33s. per week, and he paid his father 12s. per week for board and lodging. Plaintiff made plans and took small building contracts, and by the aid of his son carried them out. The case was first tried at Leeds Summer Assizes, 1874, before Justice Denman, when a verdict was entered for Plaintiff for £20 funeral expenses and £50 compensation. The Company appealed, and on the appeal case Justice Grove said—"The Plaintiff was bound to prove a pecuniary benefit accruing to him from his relationship with the deceased; but he merely showed that he derived an advantage by contract with his son. *Franklin* v. *South Eastern* is plainly distinguishable. The facts were very different. In that case the son worked for nothing; here the father paid wages. The son was servant when he assisted the Plaintiff. There was no evidence that the son was paid less than the usual wages for a skilled workman. The Plaintiff appears to have paid him the wages which a skilled workman ought to receive. The pecuniary advantage to the Plaintiff did not depend upon the relationship. The deceased at any time might have left the employ of the Plaintiff, who possibly might have succeeded in hiring a

better workman than his son." Justice Brett concurred. Judgment for Company.—*Tried in Court of Common Pleas, January* 30, 1875.—*From Law Journal Reports, vol.* 44, *page* 191.

639. *Birtles* v. *London and North Western Railway Company.*—Action for £500. Plaintiff, a yarn merchant, claimed for the death of his wife, aged forty-six, caused by an accident at London Road Station, Manchester. The deceased was a passenger, Stockport to Manchester, by 2.5 p.m. train, April 12, 1876. While standing in the carriage, about to alight, an engine ran into the van, and deceased was first thrown against the metal stanchions of netting, and then thrown with her back across the partition, causing concussion of the brain, resulting in stupor and convulsions, and she died seven weeks after, on the 27th May.

Plaintiff brought the action under Lord Campbell's Act, as administrator or executor, in which Act it specifies the action must be for "pecuniary loss occasioned after death;" a plea was also added to the record that the Plaintiff, as husband, claimed in his own right. Plaintiff claimed for loss of his wife's services as a housekeeper; also for the funeral expenses and for the medical attendance, extra nursing, and extra cost of nourishment. He proved he paid one doctor £86 and another £46, that the funeral cost £75, the mourning £30, and a housekeeper in place of his wife £35 a year. Plaintiff's counsel admitted that it would not be fair to take the £35 cost of a housekeeper and capitalise it for Plaintiff's life, as many things might intervene. In Scotland the law allowed a "solatium" in respect of pain and suffering, or sympathetic damages.

Defendants admitted that Plaintiff was entitled to such a sum as he paid and what he expended between the accident and the date of his wife's death—to reasonable medical expenses—but that £133 seemed excessive. To cost of two extra servants, Defendants complained that Plaintiff claimed a lump sum and did not define items, and that extra nourishment could not be costly; and that, while expenses during the sickness would be fair, the law allowed nothing for the death.

Defendants pleaded that the funeral expenses and mourning could not be recovered. Plaintiff quoted the case of *Osborne* v. *Gillett* (in Exchequer, page 89), where Baron Bramwell held as to funeral expenses—"It seems to me clear that he (Plaintiff) is entitled to burial expenses, and he says in his declaration that he necessarily incurred expenses in the child's funeral."

The Judge said the medical charges were indisputable items, and it rested with the Jury as to what was a fair amount. So also was the extra cost for nursing—the nurses' food and wages. The Judge was doubtful whether funeral expenses could be recovered, but considered the mourning expenses could not be entertained at all. The housekeeper being in this case a sister-in-law, he had very serious doubts whether any sum could be recovered at all.

The Jury gave a verdict as follows:—Doctors' bills, £132 4s.; extra costs for nurses and nourishment, £37 16s.; funeral expenses, £75; and they wished to allow £5 towards the mourning, but were not allowed by the Judge. Some of the Jury considered the housekeeper cheaper than the wife, and allowed nothing under that head. The Judge decided against the £75 funeral expenses, and Plaintiff accepted a verdict for £170, and 1s. in respect of injury to Plaintiff.—*Tried at Manchester Spring Assizes, March* 7, 1877, *before Justice Manisty and a Special Jury.—From Special Shorthand Writer's Report.*

640. *Horn* v. *North British Railway Company.*—Action for £700 compensation, made by the father for death of his son. The son was killed on 24th March, 1877, in an accident near Morpeth, on North Eastern Railway, and was a through-booked passenger from Kirkcaldy to London, holding a ticket issued by the North British Company. The train ran off the line owing to a deficient cant on the curve of the railway, together with the train going at too great a speed for the cant. The case was first tried in Court of Session, before Lord Gifford, when the Jury gave a verdict for £550 compensation for the death and £150 as a solatium for wounded feelings. The Company appealed by a bill of exceptions, when Lord Justice Clerk said—"It has been said the father could not recover, he

not being a party to the contract of carriage, and could not sue either for implement or for injury; and that is quite true. But this is not an action of that nature; it is an action for a wrong done to the father by reason of a fault committed by the Defenders in the course of the execution of a contract with the son. Moreover, it is only because the son, if he had survived, would have had a right of action against the Company that the father was entitled to sue the same persons in respect of the same act. So much is this the nature of the claim by a parent for the loss of his child, or a child for the loss of a parent, that, when this principle of liability was introduced into the law of England by Lord Campbell's Act, it was expressly enacted that an action by the father, or the wife or child, of the deceased should be brought against the same parties who would have been liable to the deceased had he survived. In our law (Scotland), in which the principle has been long recognised, although not strictly a derivative or representative right, the title of the father is a corollary or adjunct to the primary right of the deceased; and, although differing in its incidents, has, and must have, the same foundation. In the case of *Eisten* v. *North British Railway* the Lord President said—'It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity. On these two considerations in combination our law (Scotch) has held that a person standing in one of these relations to the deceased may sue an action like this for solatium where he can qualify no real damage, and for a pecuniary loss in addition where such loss can be proved.' Now, that being the nature of the claim, and it being one truly depending on the primary obligation to the son, I am of opinion that the ruling is right, that this claim cannot be dissociated from the original and primary wrong, and that, if the servants of the Company caused the death of the deceased, they also caused the injury to the father. It has been argued that the damages must be regulated by the place of performance, and the measure of damages regulated by that; because Henry Horn was killed in England, the right of the

father to recover here (in Scotland) must be measured by his right to recover in England, must be measured by Lord Campbell's Act; and that he is not entitled therefore to payment in the name of solatium, because, under Lord Campbell's Act, no such payment would be allowed. I think the whole argument a fallacy." Lords Ormidale and Gifford concurred. Judgment against Company.—*Tried in Court of Session, Second Division, July* 13, 1878.—*From Scottish Law Reporter, vol.* 15, *page* 707.

641. *Bourke* v. *Macroom Railway Company.*—Action for personal injury. Plaintiff claimed damages for the death of his son, who was killed while travelling on the Company's line, through an accident. The son was fourteen years of age, and was at school. The Plaintiff was a spirit grocer and general merchant, and had the management of the local post office and telegraph office. On the first trial he recovered damages for £150.

On the appeal case it was proved that the child was up to the time of his death a strong, intelligent, and well-disposed boy; that he had been receiving at school education for mercantile pursuits, and in a few years his services would be worth a substantial salary in the Plaintiff's own shop or a similar establishment. The Plaintiff's position rendered him independent of any earnings which his son might be competent to gain. Held—That there was no evidence to enable a Jury to say that it was reasonably probable that pecuniary benefit would have resulted to the father from the continuance of the life of the child, and that the Company were entitled to Judgment. Judgment for Company.—*Tried in the Exchequer Division (Ireland), January* 25, 1879.—*From Law Reports (Ireland), vol.* 4, *page* 682.

PERSONAL INJURY TO COMPANIES' SERVANTS—DOCTRINE OF COMMON EMPLOYMENT—EMPLOYERS' LIABILITY ACT (NEW ACT, 1880).

	Case No.		Case No.
Bolton v. *Midland* (1882)	642	*Morgan* v. *Vale of N.* (1865) ...	653
Griffiths v. *Earl of Dudley* (1882)	643	*Tunney* v. *Midland* (1866)	654
Robins v. *Cubitt* (1881)	644	*Warburton* v. *G. W.* (1866) ...	655
Hutchinson v. *Y. N. & B.* (1850)	645	*M'Kinney* v. *I. N. W.* (1868) ...	656
Skip v. *E. C.* (1853)	646	*Hoey* v. *D. & B. J.* (1870) ...	657
Vose v. *L. & Y.* (1858)	647	*Britton* v. *G. W.* (1872)	658
Potts v. *P. C. D. & R.* (1860) ...	648	*Conway* v. *B. & N. C.* (1875) ...	659
Riley v. *Baxendale* (1861)... ...	649	*Turner* v. *G. E.* (1875)	660
Waller v. *S. E.* (1863)	650	*Armstrong* v. *L. & Y.* (1875) ...	661
Lovegrove v. *L. B. & S. C.* (1864)	651	*Woodley* v. *Met. D.* (1877)	662
Graham v. *N. E.* (1865)	652	*Swainson* v. *N. E.* (1877)	663

642. *Bolton* v. *Midland Railway.*—Action for personal injury under the Employers' Liability Act, 1880. On 22nd January last, there was an upset of a coal train on the main up line, a short distance to the south of the Midland St. Albans Station. Plaintiff, with other men, was sent to clear the line. A chain had been put round one of the upset waggons for the travelling crane to hoist. The truck had been raised as the foreman of the break-down gang, in the exercise of his superintendence, gave the word to hoist. Owing to the raised truck swinging round smartly, Plaintiff's foot got crushed, and had to be amputated. Plaintiff was an Army Reserve pensioner, who had become unfit for service in the Reserve, and his pension ceased in consequence. Plaintiff's earnings with the Company were £1 per week, with an average of 2s. 6d. per week overtime. The pension he lost was 3s. 6d. per week. He sued for three years' earnings, £162 10s., and, at the same time, the lost pension, £27 6s. The Jury returned a verdict for £100, finding that there had been gross negligence in the superintendence of the operations during the removal of the upset waggons on the occasion in question.—*Tried in the St. Albans County Court, June* 30, 1882.—*Law Times, July* 8, 1882, *page* 184.

643. *Griffiths* v. *Earl of Dudley.*—Action under the Employers' Liability Act, where a workman was killed owing

to a defect in machinery. The case was first tried before the Dudley County Court, when a verdict for £150 was given in favour of the widow, the County Court Judge declining to recognise Defendant's plea that the deceased had contracted himself out of the Act. His Honour (Sir Rupert Kettle) gave Judgment in this case. Plaintiff was Phœbe Griffiths, widow of Henry Griffiths, late of Brockmoor, Pensnett, and she claimed on behalf of herself as such widow £150 from the Earl of Dudley as compensation for the death of her husband. On November 19, 1881, the deceased was in the employment of the Defendant as a sinker at No. 2 pit, Himley Colliery. Defendant's workmen were drawn up and let down the pit in a bowk by means of a steam engine fixed on the surface, and in connection with the steam engine there was an indicator to inform the driver of the engine of the position of the bowk in the shaft. Griffiths was being drawn up the shaft, and as he and the bowk were in great danger of being wound over the pulley he jumped out, but missed his footing, fell down the shaft, and was killed. It was shown that the engine-driver, by reason of a defect in the indicator of the engine, and which he had not detected, was unaware that the bowk had reached the top of the shaft. When the case was tried before his Honour, Mr. Waldron appeared for the Plaintiff; and Mr. Reid (instructed by Messrs. Saltwell, Benbow, and Tryon), who appeared for the Defendant, stated that his instructions were to rely upon the defence that the deceased, Henry Griffiths, had contracted himself out of the Employers' Liability Act, 1881; and to remove all technical difficulties, so as to confine the trial to this issue only, Mr. Reid made the following admissions:— (1) That Griffiths was in Defendant's employment as a workman within the meaning of the Act; (2) that Walter Worton (the engineer) was guilty of the alleged negligence within the meaning of the Act; (3) that Edward Worton was also guilty of the alleged negligence within the meaning of Act; (4) that the death of the deceased was caused in the manner alleged; (5) that sufficient notice of action was given, and all the necessary formalities complied with, to entitle the Plaintiff to bring her action; (6) that the action should be taken to be good, whether she should have sued personally

or as representative of her deceased husband; (7) these admissions to be taken subject for all purposes to the defence that Griffiths contracted himself out of the Act. Mr. Waldron, for the Plaintiff, at the close of the Defendant's case, relied upon the following points:—(1) That the evidence did not prove a contract between the deceased and the Defendant as relied upon by the Defendant; (2) that the supposed contract relied upon by the Defendant was void for want of mutuality; (3) that the contract relied upon by Defendant was not founded upon a valid consideration; (4) that such a contract would be against public policy, and, therefore, void; (5) that such a contract must be in writing, and, if in writing, must be signed by the party to be bound. His Honour said, before giving Judgment on the points raised, he thought it right to consider the position on which the defence was based. The words "contracting himself out of the Act" had become familiar in relation to the Agricultural Holdings Act. As applied to the present case, he took the words to mean that the deceased had entered into a valid contract to dispose of any interest which might accrue to his widow under the Employers' Liability Act. He had to decide whether any set contract could lawfully be made, and whether such a contract was made. The operations of the Act were two-fold. It provided, first, that the workman should have a legal remedy against his employers for injury by the negligence of fellow-workmen in the same employment. So far as the workman himself was concerned, the new statute gave him the same right of compensation as if he had not been in the service of an employer; and he (the Judge) saw no reason why he should not be liable to the same legal incidents as any other person, including the right to make it the subject of a contract. That the right became beneficial upon a contingency did not, he thought, prevent him being dealt with by the owner for a present valuable consideration. The second provision of the Act was that a workman should have the same right of compensation against the employer as if he had not been in the service of such employer. The compensation for death, and the right for such compensation, was created by Lord Campbell's Act, and that was the only right to which the Employers' Liability Act

could refer under the words "same right." The same right was conferred by the latter Act upon the widow and children of a person killed in the course of his employment as was conferred by the former Act. He, therefore, had under the circumstances to determine what was the right under Lord Campbell's Act. His Honour then, for the purpose of interpreting the latter Act of Parliament so as to apply it to the present case, quoted from several cases. In one, *Blake* v. *The Midland Railway Company*, the Judgment delivered laid down that the statute gave a cause of action beyond what the deceased could have maintained if he had ever been injured and not killed. The actions of *Reed* v. *The Great Eastern Railway Company*, *Bradshaw* v. *The Lancashire and Yorkshire Railway Company*, and *Leggott* v. *The Great Northern Railway Company* were also referred to. In the last-named case the Judgment appeared to leave no doubt whatever as to the interpretation his Honour ought to put in this case on the legal nature of the right of the Plaintiff created by Lord Campbell's Act, and enforced under the Employers' Liability Act. According to the true construction of Lord Campbell's Act, then, the deceased had no property in, or right over, the compensation to which his wife would become entitled upon his death. The authorities he had quoted, taken together, appeared to fully support this interpretation of the statute. It followed that the deceased, having no property in, or legal right over, any compensation which might accrue to his widow and family in case of his death under the circumstances mentioned in the claim, could not make it the subject of a contract entered into between him and his employers. In other words, he could not, as it was popularly called, contract himself out of the Act. For the reasons he (the Judge) had mentioned, he found that the Plaintiff was suing in her own personal and original right, and not in any derivative right or capacity, and was, therefore, entitled to his verdict. His Honour afterwards reviewed the history of the field club system, as carried on at Lord Dudley's collieries, and said as the result of long experience he believed, with respect to any claim which could be legally enforced, that substantial justice was done and moral right carried out in the collieries by the relief obtained from the field box fund. As to the contract

between employer and employed, in his judgment it did not require to be a signed contract. As to it being void for want of mutuality and arrangement, he thought the contention for the Plaintiff was right. He placed no reliance upon the fact that the employer's contributions to the field box were voluntary, and he thought there was an obligation to continue to levy contributions from the workmen, and amongst others from the deceased. On the question of the amount of compensation to be given, he found that the widow and family would be most benefited by the whole sum claimed, and he gave a verdict in favour of the Plaintiff for the full amount, £150, with costs. Mr. Waldron suggested that as the Defendants intended to carry the case to the Superior Courts his client would not be able to bear the expenses, and might therefore be prevented from obtaining the benefit of the Judgment. His Honour said Mr. Waldron must admit that the other side had given way, and done all in their power to try the case on its merits. Mr. Waldron said that was so, and he thanked the Earl of Dudley's agents for the courteous and handsome manner in which they had defended the case. Mr. Tryon said his Honour's decision raised an important question as to these insurance schemes, and the benefits accruing to widows and children therefrom, and he asked, under the circumstances, that Judgment might be stayed. His Honour consented to stay Judgment until the legal advisers of Lord Dudley had had an opportunity of testing the question raised in a Superior Court.—*Tried in the Dudley County Court, May* 16, 1882.—*From Newspaper Report (Dudley Herald, May* 20, 1882).

The Earl of Dudley then appealed to the Queen's Bench, and the case was decided as follows:—This was the case which raised the question whether a workman can contract, not only himself, but his wife (in the case of his death), out of the relief afforded by the Employers' Liability Act, 1880, in cases in which workmen would otherwise have been deprived of a remedy by the doctrine of "common employment." The Earl is the owner of extensive collieries, the workmen employed on which are numbered by thousands. For many years, before and up to the passing of the Act, there has been established in his Lordship's collieries a kind of club or benefit society, called

the "Field Box," which was a fund raised by levying weekly contributions from workmen, in some cases directly and in other cases indirectly, through the agency of the contractors under whom they worked. The Earl, as the owner of the collieries, added to the fund a gross sum equal to the amount of the total contributions levied from the workmen. The deceased was a journeyman pit sinker, and from his wages was deducted, by the contractor in whose immediate employment he was, 4d. per week to the fund. He was not asked to contribute, but the sum was deducted from the amount payable to him at each reckoning. The Earl's contributions to the fund were voluntary. The benefits derived by the workmen from the fund were—(*a*) surgical aid in case of personal injuries in their work; (*b*) a weekly allowance in case of inability to work from injuries or sickness; (*c*) money to pay funeral expenses in case of a workman's death; and (*d*) an allowance to the widow and family in case of workmen killed when engaged in their employment. The club or society was not registered as a benefit society, nor was there any rule for its management. There was no evidence that there were any officers, nor, as between the parties, any balance-sheet or audit. The payments out of the fund were voluntary and at the discretion of the agents, who managed the fund as part of the business of the collieries. As regarded the case of a widow, the allowances made were optional, and so as to the allowances to children. When the Employers' Liability Act was passed, meetings of the men took place (which, however, it was not proved that the deceased man attended), resulting in an agreement to accept the existing arrangement; and the Earl circulated conditions, the effect of which would be that all the workmen were to be members of the club or relief society on the basis already existing, and that they should thus contract themselves out of the Act; and that no workman, nor, in case of death, any person entitled to look to the funds of the society for compensation, should be entitled to sue the Earl. It was proved that Griffiths read these conditions, and went on to work as before, paying his subscriptions as he had been used to do. He afterwards lost his life in consequence of the negligence of a person in the employment of the Earl who had a superintendence which, under the Act, would give a workman or his widow a

right of action against the Earl; and his widow brought such an action, under Lord Campbell's Act and the Employers' Liability Act, in the County Court. The Earl set up as a defence the implied contract entered into by the deceased workman to waive for his widow the benefits of the Act. It was contended on the part of the Plaintiff that she was not bound by it, and that in truth there was no binding contract, it being void for want of mutuality and want of consideration, and also as contrary to public policy as tending to defeat the object of the Act. The Earl appealed from that decision, and as the question was one of very wide and general application, it was regarded as of considerable importance, and so had been adjourned a few days ago for further argument and discussion. The Earl had directed attention to the words of the Act of 1880, that in the classes of cases provided for "the workman, or, in case the injury results in death, the legal personal representatives and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman, nor in the service of the employer, nor engaged in his work."

Justice Field, in giving Judgment, said—"The question was of great importance, as the Act was very important, and one on which it was extremely desirable that there should be no uncertainty as to its effect and operation. The general object of the Act was to avoid the injustice which was considered to have arisen in cases where workmen were killed or injured by reason of negligence of persons in superintendence under the employers, and where there was before the Act no remedy. The object, however, was only to get rid of the obstacle to recovery of compensation arising merely from the fact that the person injured was in the employment of the person sued. It was not intended to get rid of actual and express contracts. When the Act came into operation, Lord Dudley intimated that he would not employ workmen except upon the conditions published, and it was clear that the deceased had assented to them. And these conditions expressly stipulated that in such cases the workman or his widow should not look to the Earl for compensation. It was a reasonable contract, fairly entered into, and there was abundant consideration for it, as the Earl largely contributed to the fund. That being so, the workman sustained

injuries in his employment which caused his death, and his widow sued the Earl, who set up the contract in defence. The County Court Judge had overruled the defence, taking a view of the contract in which the Court could not concur. First, he held the contract void for 'want of mutuality,' but that was not pressed in argument, and was clearly untenable. Next, he held that the contract was void as being contrary to public policy, because tending to frustrate the object of the Act. But why was it so? He thought, on the contrary, that it was quite consistent with and tended to carry out the object of the Act. Then it was urged that the workman could not contract his widow out of the Act, as her right of action was quite distinct from his own or his representatives; and so, in a sense, it was, for by the recent Act she could sue under Lord Campbell's Act if the representatives did not. But that, though in a sense a new right of action, was rather a change of procedure than a new right of action; the right of action really remained the same. Then the words of the Act referred to were relied upon that the workman or his widow should be in the same position as if he were not a workman in the service of the parties sued. But that only got rid of the objection arising before the Act from the doctrine of 'common employment,' and was not to be taken literally; and, indeed, if it were to be so, the action could not be maintained at all, for it could only be maintained on the ground that the workman was in the employment of the person sued. It was to be taken, then, that the deceased workman had contracted himself out of the Act. There were no words in this Act—as there were in others—providing that the workmen should not contract themselves out of the Act. And where it was not expressly provided that freedom of contract should be restrained, it was not to be interfered with. On these grounds, therefore, he came to the conclusion that this action could not be maintained against the Earl, and that the Judgment of the County Court Judge must be reversed and Judgment entered for the Earl."

Justice Cave concurred. The question, he said, was whether the workman could contract his representatives and his family out of the Act, as well as himself, and he was clear that he could. The only effect of the words in the Act relied upon

was that the objection could not be taken—in the classes of cases provided for—that the workman was in the Defendant's employment; but it did not interfere with freedom of contract, nor prevent the workman from entering into such a contract as this, which was really for his benefit. The Judgment, therefore, was entered for the Earl.—*Tried in the Court of Queen's Bench Division, July* 19, 1882.—*From Law Times, July* 24, 1882.

644. *Robins* v. *Cubitt.*—Action for personal injury. This was a case of some interest as the first that has come before the Court under the Employers' Liability Act. That Act makes the employer liable for any personal injury to a workman where it is caused by reason of any negligence of a person in the service of the employer who has any superintendence entrusted to him while in the exercise of such superintendence, or by reason of any negligence of any person in the service of the employer to whose orders or directions the workman was bound to conform. In the present case the accident arose from the shifting or swaying of the hooks of a machine for raising building materials by means of a pail attached to the hooks. The machinery was worked by two men, one at the top, the other at the bottom, the business of the latter being to hold the rope steady while the empty pail was descending. The man at the bottom, however, was absent without leave (there was a foreman of the works, but he did not appear to be aware that the man was away), and the result was that the rope, not being held by anyone, swayed and shifted, and struck against a cross-timber, and the pail was unhooked and fell on the Plaintiff, another of the workmen below (not engaged in the lowering of the pail), and caused a severe injury to him, for which this action was brought. It was brought in the County Court, but tried by the Judge with a Jury. The Jury found that the injury was caused by the negligence of the two men, and not by any defect in the machinery, and they said nothing as to the foreman. The Judge in the County Court entered a verdict for the Plaintiff for £50. This was an application to set aside the verdict on the ground that the case did not come within the Act.

Crump was for the Plaintiff; Cohen, Q.C., and Wood Hill were for the Defendant.

The question argued upon the finding of the Jury was whether the case came within the Act, as to which

Crump, for the Plaintiff, contended that wherever there was negligence of a workman by which another fellow-workman was injured the Act applied. He contended, in short, that the Act got rid of the whole doctrine of the non-liability of an employer for an injury to a servant caused by another in the same service, and in a "common employment."

The Court, however, said that this view could not be supported. If it had been intended, it could and would easily have been expressed, but it had not been. Some persons, no doubt, had contended that it ought to be, but that view had not been adopted by Parliament. It was difficult to see how the case came within either of the two sections in the Act relied on. The accident was found to have been caused by the negligence of two workmen in a "common employment," neither of them in the position of a manager or a superintendent of work. They were actually doing the work with the Plaintiff, and the Jury had found that there was no defect in the machinery.

Crump then argued that the men were working under a system which was allowed by the employer, and which was not sufficiently guarded and protected against miscarriage. The workmen beneath were exposed to danger from the descending pail, and as the man below might go away, the system or machinery ought to be so managed as to guard against the consequences of such absence and default; but

Justice Grove observed that this argument made the employer liable for any neglect or misconduct of the workmen engaged in a common employment.

Justice Lopes: Even in a case where the machinery is in itself quite sufficient and there is no defect in it.

Crump urged that the men below could not well see what took place above them, their view being intercepted by the scaffold, and their lives depended on the due descent of the pail coming down, and this required some precautions. The words of the Act were large enough, as they included "plant connected with or used in the business."

Cohen objected that all this went to impeach the finding of the Jury, and there had been no application for a new trial on the part of the Plaintiff.

Crump replied that he had gained the verdict, and, of course, he had no occasion to move for a new trial until his verdict was impeached on the ground of one of the findings of the Jury being against it, and then he surely had a right to contend that the finding was wrong.

The Court, however, pointed out that this was a County Court case, in which the Superior Court could not grant a new trial. The application for a new trial would be in the County Court.

Justice Lopes added that he could not understand how the Judge came to enter the verdict, upon these findings, for the Plaintiff.

Justice Grove said he had no doubt the Judge was under the impression that the Act made the employer liable in all these cases, but that was a mistake.

Crump said he could not carry the argument further if that was the view of the Court; and the Court, without calling upon counsel on the other side, gave Judgment for the Defendant.

Justice Grove said the Act specified certain specific classes of cases in which the employer was to be held liable, but neither of the two classes of cases supposed to include the present case really included it. The first rendered the employer liable if the machinery was defective, but here it was found to be sufficient, and all the arguments of the counsel for the Plaintiff only went to invalidate that finding and in favour of a new trial, which the Court could not entertain. Moreover, these arguments appeared to come to this, that the employers would be liable if the machinery, though sufficient in itself, was not adapted to render it adequate to meet and provide for any negligence on the part of the workmen employed; but such a view could not be entertained. It was impossible, in reason, to expect the employer to provide against all possible contingencies. Then there was another class of cases, in which the employer would be liable for the negligence of any person who had any superintendence entrusted to him; but here it was not contended that the workmen by whose negligence the accident was caused had any such "superintendence" entrusted to them; and as to the

other part of the section—acting under any directions to which they were bound to conform—it was not contended that this part of the section would apply. The truth was that, if the Act really meant what had been suggested on the part of the Plaintiff, it would come to this—that the employer was always to be liable in these cases. If that had been intended it would not have been necessary to specify any classes of cases, and it would have been sufficient to say simply that the employer should be liable for an injury caused by the negligence of any person in his employment; but the Act did not say that, and, on the contrary, specified certain classes of cases, within which this case did not come. It was clear that the County Court Judge decided the case under an erroneous notion as to the law, and the result was that the Judgment must be set aside and entered for the Defendant.

Justice Lopes concurred. "The question," he said, "is what is the effect of these findings, and I am clear that the effect is that the Defendant is entitled to our Judgment. The Judge who tried the case must have misconceived the effect of the Act, and thought that the Legislature intended to make the employer liable for the negligence of any of his workmen. That is most clearly not the effect of the Act, and therefore the Judgment must be for the Defendant." This decision, it will be seen, is of great importance, as it shows that the Act only applies in the particular classes of cases specified. No leave to appeal was asked. Judgment in favour of employer.—*Tried in Court of Queen's Bench, November* 16, 1881.—*From Law Times, vol.* 72, *page* 47.

CASES PRIOR TO EMPLOYERS' LIABILITY ACT.

645. *Hutchinson* v. *York Newcastle and Berwick Railway Company.*—Action by a widow for the death of her husband, a Company's servant, who, while travelling on the Company's business, was killed in a collision. The action was brought under 9 and 10 Vic., cap. 93, by the widow, as administratrix. Plaintiff contended no foresight or care of the deceased would have protected him. He was guilty of no negligence whatever, and had nothing to do with the management of either train. Suppose a servant is driving a carriage

belonging to his master, and another carriage, in which his master is, is driven wrongfully against his carriage and he is injured, is he to be without remedy? Suppose a person employed to carry a letter bag along the road, may he be run over with impunity by a carriage driven by any other of his master's servants?

Baron Alderson, in giving Judgment, said—"The Company would undoubtedly have been liable if the party injured had been a stranger travelling as a passenger for hire. This case appears to the Court undistinguishable from *Priestly* v. *Fowler* (3 Mee. & W., 1; s.c., 7 Law J. Rep., Ex., 42). In that case the Plaintiff was a servant of Defendant, and had sustained an injury by the Defendant having overloaded a van in which he, the Plaintiff, was travelling by the direction of the Defendant in discharge of his ordinary duties. The principle upon which a master is in general liable for accidents resulting from the negligence or unskilfulness of his servant is that the act of the servant is in truth his own act. If, instead of a master driving his carriage with his own hands, he employs a servant to drive it, that servant is but an instrument set in motion by the master. It was the master's will that the servant should drive, and whatever the servant does in order to give effect to his master's will may be treated by others as the action of the master. If by unskilfulness of the servant he is himself injured, he cannot claim damage from his own master upon an allegation that his own negligence was in point of law the negligence of his master. Suppose that by the unskilfulness of A. the other servant, B., is injured while they are both jointly engaged in the same service, then, we think, B. has no claim against the master. They have both been engaged in a common service, the duties of which impose a certain risk upon each of them, and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew when he was engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but on the part of his own fellow-servant also, and he must be supposed to have contracted on the terms that, as between himself and the master, he would run that risk. The deceased had put himself into one of the Company's carriages

under the guidance of others of their servants, and by the neglect of those other servants, while they were engaged together with him in one common service, he being about his duty travelling, the accident occurred." Judgment for Company.—*Tried in Court of Exchequer of Pleas, May* 22, 1850. —*From Law Journal Reports, vol.* 19, *page* 296.

646. *Skip* v. *Eastern Counties Railway Company.*— Action by a guard for compensation for loss of his arm, which was so crushed at Lea Bridge when coupling waggons that it had to be amputated. Plaintiff contended the accident arose from want of an under guard to assist him. The engine started and threw him upon the rails and under the first truck. For three months Plaintiff had done the work without an under guard. The Company contended Plaintiff had voluntarily undertaken to attach the waggons to the engine without any assistance. The case was first tried at the London Sittings (Guildhall) in Michaelmas Term, before Baron Martin, when Plaintiff was non-suited. He appealed, and on the appeal case Baron Parke said—"If his duties were more than he could perform, he ought not to have accepted the service. The plea of 'Not guilty' traverses the breach; the Company say they did take due and proper care. The Company were not bound to keep twenty servants. They are to be the judge of the number. They are, indeed, bound to see that their servants are persons of proper care and skill. Plaintiff went into the service and willingly incurs the danger." Baron Alderson said—"He might have left the service. The Jury are not to be judges of the sufficiency of the number of servants a man keeps. The Plaintiff stayed in the situation three months without an under guard to assist him and without making any objection." Judgment for Company.—*Tried in Court of Exchequer, November* 24, 1853.—*Law Journal Reports, vol.* 23, *page* 23.

647. *Vose* v. *Lancashire and Yorkshire Railway Company.*—Action for personal injury. A blacksmith in the employment of the East Lancashire Company at Liverpool Station was engaged in repairing a carriage in a siding at the Liverpool Station, which is in the joint occupation of the East

Lancashire Company and the Lancashire and Yorkshire Company. He was killed by an engine of the Lancashire and Yorkshire Company being shunted into a siding at which he was at work. It appears that the rules for the regulation of the station were published headed in the joint names of the two Companies, and that the servants employed in shunting the engines were the joint servants of the two Companies; but the engine-drivers and persons employed as the deceased was in repairing the carriage were the separate servants of each Company. It was found that the rules as to the precautions to be taken before shunting trains into the sidings had been observed, and that there had been no negligence on the part of deceased, the shunter, pointsman, or engine-driver, but that the accident was occasioned by the rules being defective.

Held—That the Lancashire and Yorkshire Company were liable to an action at the suit of the administratrix of such servant. Thus it was established that where two companies employed a joint staff of servants at a station for certain purposes, each company is liable for the negligence of its servants to the servants of the other company in matters not connected with the joint purposes. Judgment against the Company.—*Tried in the Court of Exchequer, January* 18, 1858.—*From Hurlstone and Norman's Exchequer Reports, vol.* 2, *page* 728.

648. *Potts* v. *Port Carlisle Dock and Railway Company.* —Action by a widow for death of her husband, a Company's servant. At a junction of two lines of rail there was a turntable. This turntable had originally been made for a single line, and when it became to be used for a double line it appeared, from its construction, to have been braced and strengthened for one line, but not for the other; but it had been in use for between four and five years. On the occasion of the accident the turntable broke on the side where it was not braced, and a carriage was thrown over on and killed Plaintiff's husband. The case was first tried at Carlisle, before Justice Hill, when Plaintiff was non-suited, but leave to move was given. On the appeal case Chief Justice Cockburn said—"I am of opinion our Judgment must be for the Company. It is necessary to make out, not only that the work in the turntable

was insufficient, but that there was negligence by not employing a really competent person to do the work. The negligence of the person doing it is not sufficient alone to charge the Company; it must be shown that the Company were negligent in not employing reasonably competent persons. If Plaintiff can show that the work was so grossly bad as to deduce negligence, then I am willing to admit that it may not be necessary to call evidence of negligence. Where machinery has borne the test of experience for four and a half years, the natural conclusion is that the construction of the work was duly competent." Justice Crompton said—"The law is established for our guidance in the relation of master and servant. A servant cannot complain of an accident arising in course of his duty unless caused by culpable negligence of the master. There are different sorts of negligence—the negligence of the master himself, and the negligence in making machinery, and the negligence of another servant; and the third is this case, and must clearly be brought home to the master. I concur in the opinion of the Chief Justice." Justice Hill also concurred. Judgment for Company.—*Tried in Court of Queen's Bench, May* 10, 1860.—*From Law Times, vol.* 2, *page* 283.

649. *Riley* v. *Baxendale and Another (Pickford & Co.).*—Action by a widow for the death of her husband, a porter in Defendants' service. It appeared that while deceased was employed in the warehouse in turning a truck on a turntable, he was pressed between the buffer of a truck and the wall, and died within a few moments. The fact of this truck being of a larger size than those in ordinary use was relied upon as negligence of the Defendants, and the deceased being in the discharge of his duty, and not having contributed to the accident, the Defendants, it was contended, were liable. The case came before the Lord Chief Baron, Guildhall Sittings, Michaelmas, 1860, who was of opinion that these facts, if proved, would not sustain the action, and also that no such contract as that stated in the declaration could be implied. He directed a non-suit. The case was taken to the Queen's Bench, when that Court affirmed the decision.—*Tried at Queen's Bench, January* 15, 1861.—*From Hurlstone and Norman's Reports, vol.* 6, *page* 445.

650. *Waller* v. *South Eastern Railway Company.*—Action by a widow for death of her husband, a guard, who was killed by his train running off the line. It was proved the accident occurred through the decayed condition of the trenails which fastened the chairs to the sleepers. It was the duty of the ganger (servant to the Company) to see and keep in proper repair and condition the permanent way by renewing such trenails as were decayed. It was held that where servants are engaged in one common object the injury sustained by one servant in consequence of the negligence of another servant does not give a right of action against the master.—*Tried in Court of Exchequer, May* 7, 1863.—*From Law Journal Reports, vol.* 32, *page* 205.

651. *Lovegrove* v. *London Brighton and South Coast Railway.*—Action by a labourer in a ballast pit for injury sustained, owing to an iron train rail insecurely fastened down starting up and injuring him whiie he was pushing a train truck over it. The deputy foreman appeared to be the person in fault for the imperfect fastening of the rail. Chief Justice Erle held that the Company were not liable, as the negligence was caused by a fellow-servant of the Plaintiff, and without any default or neglect of duty on the part of the Company. It was a case precisely in point with *Waller* v. *South Eastern Railway Company.* Judgment for Company. —*Tried in Court of Common Pleas, June* 4, 1864.—*From Law Journal Reports, vol.* 33, *page* 329. (The case of *Morgan* v. *Vale of Neath* is a similar case.)

652. *Graham* v. *North Eastern Railway Company.*—Action for personal injury. Plaintiff was a guard on the North British Railway, and travelled on a through train between Newcastle and Hexham. On Sunday, 1st November, 1863, he left Newcastle to go to Hexham in a second class carriage, one compartment of which consisted of a guard's break van for a passenger train. When just past the Bladen Station, the driver shut off the steam to check the speed. The Plaintiff put his head out of the window of the van to see that all was right (as was his duty to do), and was violently struck against a post at the side of the railway and seriously

injured. The post formed part of a bridge across the railway supporting a tramway from a colliery. The distance of this post from the window of the van was 16 inches. The distance between the post and the outer rail was 28 inches. The post was 14 inches out of the perpendicular, leaning inwards, and was so when the bridge was originally constructed. The North British Company had running powers over this section of the North Eastern Railway. The Judge left it to the Jury to say if the position of the wooden post was such as to be dangerous to a guard who has to keep a sharp look-out, as stated in the Company's rules. The Jury answered in the affirmative, and gave Plaintiff damages for £80 against the Company.

On the appeal case Justice Erle said—"Having regard to the finding of the Jury, I feel bound to come to the conclusion that the rule must be discharged." Judgment against the Company.—*Tried in the Court of Common Pleas, February* 18, 1865.—*From Scott's Common Bench Reports, vol.* 18, *page* 229.

653. *Morgan* v. *Vale of Neath Railway Company.*—Action for personal injury. A carpenter in the general employ of a railway company, while engaged on a ladder in painting an engine-shed, was injured through the carelessness of one of the railway porters, who, in moving a waggon on a turntable, knocked the ladder down, and Plaintiff fell down 26 feet and was injured. Held—That the Company were exempt from liability on the ground that the carpenter and porter were fellow-servants in one common employment for a common object.—*Tried in Exchequer Chamber, November* 27, 1865.—*From Law Times Reports, vol.* 13, *page* 564.

654. *Tunney* v. *Midland Railway Company.*—Action for personal injury. The Plaintiff was employed by the Company as a labourer to assist in loading what is called a "pick-up" train with material left by platelayers and others upon the line. One of the terms of his engagement was that he should be carried by the train to and from Birmingham at the end of each day. As he was returning to Birmingham after his day's work was done, the train in which the Plaintiff was, through

the negligence of the guard who had charge of it, came into collision with another train, and the Plaintiff was injured. Held —That inasmuch as the Plaintiff was being carried, not as a passenger, but under the course of his contract of service, there was nothing to take the case out of the ordinary rule which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant when both are acting in pursuance of common employment. Judgment for the Company.—*Tried in the Court of Common Pleas, January* 23, 1866.—*From Law Reports, Common Pleas, vol.* 1, *page* 291.

655. *Warburton* v. *Great Western Railway Company.*— Action for £150 by a carriage cleaner for injuries received at Victoria Station, Manchester, owing to an engine being shunted with violence against a carriage he was inside cleaning. Plaintiff was the servant of the London and North Western Company, and the driver of the engine was in the service of the Great Western Railway Company (Defendants), driving one of that Company's engines. The Great Western Company's engines had access to the station, and, according to the station regulations, were under the control of the London and North Western Company's superintendent, and the driver of the engine should have waited for a signal before shunting into the siding. Instead of waiting, he shunted improperly without warning, and so caused the injury. The Great Western Company contended the driver, while in the station, was engaged in a common employment with the Plaintiff under the direction of the superintendent in charge of the station; that the test of common employment is not whether the two are paid by the same employer, but whether they are both subject to the orders of the same person in authority. The action was first tried at Manchester Summer Assizes, before Baron Martin, 1866, and the Jury found a verdict for £150 against the Company. The Company appealed, and on the appeal case Chief Baron Kelly said—" We are of opinion that, inasmuch as the injury sustained by the Plaintiff was occasioned by the servant of the Company, not in the course of any common employment or operation under the same master, but by the negligence of the servant of the Company in the discharge of his ordinary duty to the

Company alone, this case is distinguishable from all which have been decided in relation to the injuries by a fellow-servant in common employment, and therefore our Judgment is against the Company."—*Tried in Court of Exchequer, November* 6 *and* 17, 1866.—*From Law Journal Reports, vol.* 36, *page* 9.

656. *M'Kinney* v. *Irish North Western Railway Company.*—Action for personal injury to a guard, which resulted in his death, from a train running off the line. The writ of summons and plaint stated "it was the duty of the Company to keep the said railway, and the engines and carriages thereon, in proper and sufficient order and repair for the safe conveyance of the Plaintiff's husband" while acting as a guard; but that the said Company failed to do so, but permitted such railway, and its engines and carriages, to get out of proper and sufficient order and repair, whereby, and by reason of the negligence of the Company in that behalf, the injuries complained of occurred.

It was held, reversing the Judgment of the Court of Queen's Bench, that the Plaintiff disclosed a good cause of action. Baron Fitzgerald dissented.—*Tried in the Court of Exchequer Chamber (Ireland), May* 27 *and June* 13, 1868.—*From Irish Reports, Common Law, vol.* 2, *page* 600.

This case illustrates the master is liable for an accident arising from the improper construction of a machine where the master is aware of the defect but the servant is not.

657. *Hoey* v. *Dublin and Belfast Junction Railway Company.*—Action for personal injury. In an action by a servant against his employer for negligence in choosing a fellow-servant owing to whose incompetence the Plaintiff suffered an injury, it is not a sufficient answer that the Plaintiff, previously to the injury for a reasonable time in that behalf, was aware of the fellow-servant's incompetence.

Negligence on the part of the Plaintiff would disentitle him to recover, but knowledge of the incompetence of the fellow-servant is only *evidence* of negligence on the Plaintiff's part to be submitted to the Jury.—*Tried in Court of Common Pleas, June* 10, 1870.—*From Irish Reports, Common Law, vol.* 5, *page* 206.

658. *Britton* v. *Great Western Cotton Company.*—Action for personal injury. Samuel Britton, deceased, aged twenty-two, was employed by the Defendants, the owners of a factory within the meaning of the 7 Vic., cap. 15, to grease the bearings between the fly and spur-wheel on a steam engine in their engine-house. In order to do the work he had to stand on a wall 2 ft. 3 in. thick in a cavity made for the purpose, into which he crawled through the spokes of the fly-wheel, the fly-wheel being on his left hand, revolving in a "wheel-race" in the engine-house, and the spur-wheel on his right hand, revolving in another room in the factory. The distance between the spokes of the two wheels was 2 ft. 10 in. There was no fence along the wall edge of the "wheel-race" on which he was placed to do his work, and the fly-wheel (near to which, however, children or young persons were not liable to pass or be employed) was unfenced. At the time of the accident Britton had been at the work for five days. On the sixth morning he was caught by the fly-wheel, whirled into the air, and killed. At the trial, on an action by his widow and administratrix for pecuniary loss sustained by his death, the Jury found he had not been guilty of contributory negligence either in undertaking the employment or whilst engaged upon it, and returned a verdict for the Plaintiff. On a rule to set it aside, pursuant to leave, on the ground that there was no statutory duty to fence the place in question, and that the deceased had voluntarily encountered the risk incidental to his employment:

Held, first—That the Defendants were bound, under the 7 Vic., cap. 15, sec. 2, to fence the place where Britton had to stand, it being the edge of a "wheel-race" not otherwise secured, and consequently that the dangerous character of the employment was not so obvious as that he must necessarily be taken to have known it, or that, even assuming he did know it, that circumstance alone was not enough to constitute him a volunteer in such a sense as to exonerate the Defendants from liability for the consequence of their breach of their statutory duty.—*Tried in the Court of Exchequer, January* 29, 1872.—*From Law Reports, Exchequer, vol.* 7, *page* 130.

This case may have an important bearing on the Employers' Liability Act. It illustrates that where a statute

requires some precaution to be taken for the protection of a servant, a master is liable for the injury to a servant in consequence of the master's default, unless the servant knew the risk in consequence of that default to which he is exposed.

659. *Conway* v. *Belfast and Northern Counties Railway Company.*—Action for personal injury to a Company's servant. The Plaintiff's husband was a milesman, and at six o'clock on the morning of the 1st August, while walking on the line near Belfast on the way to his work, he was killed by a down train running on the up line of rails. In consequence of repairs then being effected on that part of the railway, the manager of the Company issued, as he had authority to do, directions that the down trains should run on the up line of rails. A notice had been sent to the nearest station-master, who on the same day went and explained it to the ganger. There was some contradictory evidence as to whether or not the latter understood the notice, but the notice was not sent to the ganger himself, and he therefore was unable to read or explain it to the milesmen. On the first trial the Jury found for the Plaintiff.

On the appeal case Justice Morris said—"The contention of a personal neglect of the Company or its directors was not urged at the trial, which altogether proceeded on the neglect of the manager; but if we considered it could be sustained, we might direct a new trial. Being of a contrary opinion, we must direct the verdict to be entered for the Company." Thus the general traffic manager of a railway company and a milesman in their employment on the railway are fellow-servants, so that the company are not responsible for the death of the latter from the negligence of the former. Judgment for Company.—*Tried in Court of Common Pleas, November* 8, 1875.—*From Irish Reports, Common Law, vol.* 9, *page* 498.

660. *Turner* v. *Great Eastern Railway Company.*—Action for personal injury, through some coal trucks being shunted on to a wrong siding and injuring Plaintiff. A man named Lanesborough was employed by the Company at one of their stations to unload coal at some coal shoots; he employed

Plaintiff (Turner) to help him do the work. Lanesborough paid him his wages, and the Company had no control over Turner, so as to be able either to engage or dismiss him. At the first trial, at Guildford, in August, 1874, before Baron Bramwell, the Plaintiff obtained a verdict. The Company appealed, on the ground of common employment, which Turner must have contemplated at the time he entered upon the work. Chief Justice Lord Coleridge said—"The case is a difficult one, because it is so near the line, and the line to be drawn is one which it is not easy to state in language, and I will not attempt to give a definition calculated to meet all cases. The Company did not pay the Plaintiff, and had no control over him, so as to be able to engage or dismiss him. So, on these two grounds, it seems to me that this case is clearly distinguishable from *Wiggett* v. *Fox*. Now I will not say that this is the only test, but it is put forward as *the* test by which to distinguish whether a man is a contractor or a servant; so here it would be the test to discover whether Lanesborough was a contractor or a servant; and on this point the report of the Judge says that he could engage and pay his own servants. Suppose the situations reversed, and that the Plaintiff had negligently caused injury to someone else. It seems to me extravagant to say that such a person could sue the now Defendants (Company) for such injury. They would say, unanswerably, 'We had no control over the man; we did not engage him, and could not dismiss him, and we are therefore not liable for his negligence.'" Justices Grove and Lindley concurred. Judgment against Company.—*Tried in Court of Common Pleas, June* 10, 1875.—*From Law Times Reports, vol.* 33, *page* 431.

661. *Armstrong* v. *Lancashire and Yorkshire Railway Company.*—Action for £400 for personal injury. Plaintiff was a travelling carriage inspector of the London and North Western Railway Company, and was travelling on their business on a free pass in one of their trains. The train travelled over a branch line belonging to the Defendants (Lancashire and Yorkshire Company), and at Clayton Station came into collision with some trucks that were being shunted by Defendants' servants. The danger signal had been shown, but the London and North

Western Company's driver did not see it, and did not obey it. The case was first tried at Manchester Summer Assizes, 1875, when the Jury found the Company were negligent in shunting when the train was due, and the driver was negligent in disregarding the danger signal. They assessed the damages at £400, but the learned Judge (Archibald) directed a verdict for the Company. Plaintiff appealed, and on the appeal case Baron Bramwell said—"The Plaintiff cannot complain against the London and North Western Company, because he was their servant; and yet it is said that he can maintain an action against the Lancashire and Yorkshire Company. I am prepared to decide this case on the authority of *Thorogood* v. *Bryan* (18 Law Journal Reports, C.P., 336), which may have been impeached, but has never been overruled." It was thus held by the Court that the contributory negligence of the driver of the train disentitled the Plaintiff to recover damages for the negligence of the Defendants, as found by the Jury. Judgment for Company.—*Tried in the Court of Exchequer, January* 23, 1875.—*From Law Journal Reports, vol.* 44, *page* 44.

662. *Woodley* v. *Metropolitan District Railway Company.* —Action for personal injury. The Plaintiff, a workman in the employ of a contractor engaged by the Company, had to work in a dark tunnel rendered dangerous by the passing of trains. He was working on a side wall, and trains were passing the spot every ten minutes. The line being there on a curve, the workmen would not be aware of the approach of a train until it was within 20 or 30 yards of them. The place in question was wholly without light. No one was stationed to give notice of an approaching train. The speed of the trains was not slackened when arriving near where the men were at work, nor was any signal given by sounding the steam whistle. While he was reaching across the rail to find a tool he had laid down, a train came up suddenly, and struck him and seriously injured him. It appeared that on a previous occasion, when similar work was being done, a "look-out" man had been stationed to give warning of the approaching trains, but this precaution had been discontinued.

On the first trial the Jury found that the Company, in not

adopting any precautions for the protection of the Plaintiff, had been guilty of negligence, and gave a verdict against the Company for £300 damages.

On the appeal case it was held by the majority of the Court of Appeal (Chief Justice Cockburn, Justices Mellor and Grove), reversing the decision of the Court of Exchequer, that the Plaintiff, having continued his employment with full knowledge, could not make the Defendants liable for an injury from danger to which he voluntarily exposed himself.

Justices Mellish and Baggallay dissented, and held that the Plaintiff, as servant of the contractor and not to the Company, had entered into no contract with the Company which would modify the ordinary duty of those who carry on a dangerous business to take reasonable precaution that no one should suffer personal injury from the manner in which it is carried on, and that no such contract should be inferred from the Plaintiff remaining in his employment. Judgment for Company.—*Tried in the Exchequer Division, February* 14, 1877.—*From Law Reports, Exchequer Division, vol.* 2, *page* 384.

663. *Swainson* v. *North Eastern Railway Company.*—Action by a widow for the death of her husband, a signalman, who was killed near his signal box at Leeds by a North Eastern engine and van. The stations of the Great Northern Company and the North Eastern Company at Leeds adjoin, and deceased was a signalman on the "joint station staff." He wore the uniform of the Great Northern Company, and was paid by that Company on a pay sheet headed "Great Northern Railway Traffic Department Pay Sheet, Joint Station Staff." The cost of his services was borne equally between the two Companies. On the 7th May, 1875, deceased (Swainson), in discharge of his duty, was standing on the six-foot space between the Great Northern and the North Eastern departure lines. A North Eastern engine and van came towards the station on the Great Northern arrival rails with some Great Northern coal trucks, and Swainson signalled the driver to go on to the North Eastern departure line. The driver obeyed, and went on to that line until he passed some points, when he reversed his engine and backed out again, and, having a van before the engine, his

view of the line was obscured. Swainson was then looking in the other direction, watching a train coming from the south, and failed to observe the engine and van coming out. He was struck by the step of the van, knocked down, and killed. The engine-driver did not whistle, and evidence was adduced that it was unsafe to back out with a van in front. The case was first tried before Justice Quain, Middlesex Sittings, June, 1876, when the Judge left to the Jury—(1) Was there negligence on the part of the driver of the North Eastern Company's engine? (2) Was there contributory negligence on the part of the deceased? The Jury answered "Yes" to the first question, and "No" to the second, and gave a verdict to Plaintiff of £600, viz., £200 to the widow, and £100 to each of four children. Leave was given to the Company to move to enter the verdict for themselves on the ground of "common employment," the Court to have power to draw inferences of fact.

On the appeal case Baron Pollock said—"It will be well, in the first place, to see what is the principle affecting this case which can be gained from authority. Up to a certain point this is clear, that whenever the person injured, and he by whose negligent act the injury is occasioned, are engaged in a common employment in the service of the same master, no action will lie against the master if he be innocent of any personal negligence. The deceased, though engaged by the Great Northern Company and wearing their uniform, was one of a joint staff, and for four years had received his weekly wages as such, and he was therefore practically in the service of two companies, who *quoad* his service and employment were partners. But further than this, as was said by Lord Colonsay, in *Wilson* v. *Merry*, in the House of Lords, 'we must look to the functions the party discharges and his position in the organisation of the force employed, and of which he forms a constituent part.' Referring, then, to the duties of Swainson, and the very acts on which he was engaged at the time of his death, the evidence shows that they were not performed by him as a servant of or for the benefit of one company alone, but were essentially necessary for the common business of both, namely, the interchange of the traffic between the two stations. The case, therefore, falls within

and is governed by the principle that where there is common employment in common service the master is not liable, and our decision is for the Company, for whom Judgment must be entered." Judgment for Company.—*Tried in the Exchequer Division*, *May* 11, 12, *and* 14, *and June* 1, 1877.

The Plaintiff carried the case to the Court of Appeal, where the decision of the Court of Exchequer was reversed. Lord Justice Bramwell said—"I am of opinion the Judgment of the Court of Exchequer ought to be reversed, and that Plaintiff is entitled to recover. The general rule is that a master is liable for damage done to a stranger by the negligence of his servant, if the servant is acting within the scope of his authority. Where a man is run over by a servant with whom he has nothing to do and no acquaintance, it is reasonable that he should have a remedy against the master for the servant's negligence. A master's guests, however, cannot sue the master of the house for injuries which they may suffer owing to the negligence of his servants, there being a relation existing between the person injured and the master of the servant. I cannot take the same view on the facts as Baron Pollock, for I think that in no case was Swainson the servant of the North Eastern Railway. He was not hired by them, they could not discharge him, he had no claim for wages against them, they gave him no orders except through the Great Northern Company. It is like the case of a carman going to a warehouse to receive bales of cotton, and a bale being negligently dropped on him by the warehouse-keeper who was lowering the bales to him. There it was held that an action could be maintained against the warehouse-keeper, although the operation was in one sense a joint operation. I agree with the Judgment of the Court below as to the law, but I differ from it as to the facts." Lord Justice Brett concurred. Lord Justice Cotton also concurred, and remarked—"It was said that half Swainson's wages were paid by the North Eastern Company; but that is not the proper way of putting it in legal language. Really half the amount paid for his wages was repaid by the North Eastern Company to the Great Northern Company, and in respect of this amount the Great Northern Company had a claim against the North Eastern Company, but Swainson had none." Judg-

ment against the Company.—*Tried in the Court of Appeal, Feb.* 21, 1878.—*From Law Times Reports, vol.* 38, *page* 201.

Miscellaneous Cases of Personal Injury.

Case No.

Hicks v. *Newport Abergavenny and Hereford* (1857) 664
Lord Campbell directed the Jury to deduct £1,000 from their damages, such sum being the amount insured on the deceased's life.

Saunders v. *London and North Western* (1860) 665
A passenger injured in an accident persisted in doing his business, and thereby aggravated his injury; still the Company were held liable for the maximum injury.

Pym v. *Great Northern* (1862)... ... ... 665½
Accidental death—£9,000 recovered.

Dickenson v. *North Eastern* (1863) 666
No compensation can be recovered for the benefit of an illegitimate child if the supporting relative is killed by neglect or wrongful act.

Alton v. *Midland* (1865) 667
A trader sues for loss of services of his traveller, injured in an accident—Held, that the contract was not made with the trader, and that he cannot recover.

Austin v. *Great Western* (1867) 668
Company held liable for the breaking of the leg of a child over three months old, although no fare was paid according to the Company's rules.

Kearney v. *London Brighton and South Coast* (1871) 669
A brick fell from an archway of a bridge over a public road and injured a passer-by on the shoulder—Company held responsible.

Brown v. *Great Western* (1872) 670
The Court will allow a company's medical man to examine a Plaintiff's injuries.

Skinner v. *Great Northern* (1874) 671
Company's medical officer inspecting a passenger injured on the railway—Plaintiff cannot demand to see his report to the Company.

Bradshaw v. *Lancashire and Yorkshire* (1875) 672
Executors can recover for medical attendance and loss of trade owing to a deceased person having suffered pecuniary loss during a long illness resulting from an accident.

Case No.
Herschfield v. *London Brighton and South Coast* (1876) 673
Compensation to an injured passenger must not be accompanied with fraudulent representation.

Berringer v. *Great Eastern* (1879) 674
Special case, where a second company (not the contracting company) could be sued by a father for loss of services of his son arising from an accident.

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664. *Hicks* v. *Newport Abergavenny and Hereford Railway Company.*—Action for personal injury. In charging the Jury in this case as to the measure of damages, Lord Campbell said—"Gentlemen, the case is entirely in your hands, and the only direction I can give you in point of law is that you ought to consider the amount of pecuniary loss which the family have sustained by the death of the father. You are not to look to the wants of the family, but to the loss they have sustained by the father's death; and I would say, in the words of a very learned brother Judge, 'Take a reasonable view of the case, and give a fair compensation.' I think you should first consider what would be the sum if there were no insurance. If there was no insurance, what would be the amount? Well, then, if there be an insurance for £1,000 by some company that insured him against accidents by railways, and they being entitled to £1,000 policy, it is quite clear that there should be a reduction from the aggregate amount in respect of that £1,000. Then, with regard to the policy upon his life independently of the accident, if you allow any reduction (and I think you will probably consider that some deduction ought to be allowed), it will only be in respect, I should think, of the premiums that would be paid by the family, or which would have been paid by himself if this fatal accident had not happened. I leave that, however, entirely in your hands. You will first make a calculation, and say what you think would be a reasonable sum that ought to be allowed as a compensation for the pecuniary loss his family would sustain had there been no insurance; you will then take from that £1,000 insured against accidents, and then any reasonable sum that you think should be further deducted in respect of the life insurance. You will then have the balance which is to be distributed among the

family, and then it will be your duty to allot it among the different members of the family according to your judgment."—*Tried at Nisi Prius, London Sittings after Hilary Term, February* 17, 1857.—*From Best and Smith's Reports, vol.* 4, *page* 403.

665. *Saunders* v. *London and North Western Railway Company.*—Action for £2,600 for personal injury, causing shock to nervous system. Plaintiff obtained a verdict for this sum from the Jury, and the Company now appealed on the ground that the damages were excessive. The accident occurred in January, 1859, near Liverpool, and Plaintiff, who was in a first-class carriage, was thrown with great violence against a passenger on the opposite seat, resulting in serious injury to both. Plaintiff was a barrister earning £300 net per annum; the compensation given him was equal to an annuity of £200 per annum for life. The Company contended that owing to Plaintiff's incaution he had aggravated his ailment; that the doctors, after consultation, advised that Plaintiff should abstain from business for full two years, instead of which he only abstained from business for fourteen days. Had the medical advice been followed, the Plaintiff would only have suffered temporary inconvenience; and if by his obstinacy or his neglect to act upon medical advice he had rendered the injury of a permanent character, the Company are not responsible, and should not be compelled to pay for it. Chief Justice Erle—"It was a question peculiarly the province of the Jury, and I cannot make out that the Jury were in any way misled in a matter of law, or that they misapprehended or mistook the value of the evidence. It is impossible for anyone to say positively whether, if the Plaintiff had acted on the advice of the medical man, and had abstained for a considerable time from his professional labours, the depression of mind resulting from that circumstance might not have been more injurious than his continuing his work; and really it ought not to be brought against him that he continued to work to maintain his position in the profession." Justices Willes, Byles, and Keating concurred. Judgment against Company.—*Tried in Court of Common Bench, April* 16, 1860.—*Law Times Reports, vol.* 2, *page* 153.

665½. *Pym* v. *Great Northern Railway Company.*—Action for the death of Plaintiff's husband, aged forty-one, by an accident on the railway, caused by negligence of the Company's servants. The deceased was a private gentleman, and of no profession. The income from his estate was £3,869 a year, passing at his death to his eldest son. By provisions of a settlement the widow came into £1,000 per annum for her life, and the eight younger children to £800 a year. The deceased left £3,390 personal property. The case was first tried at the Westminster Sittings after Trinity before Chief Justice Cockburn. The Jury gave a verdict for £13,000, being £1,000 for the widow and £1,500 for each of the eight children. The Company appealed, when Chief Justice Cockburn delivered Judgment. He said—"It was objected to by the Company that, independently of the amount of damages, the verdict cannot stand (1) because the case does not come within the terms of the statute, and (2) because the loss, even if a pecuniary loss at all, is in the present instance too uncertain to be properly the subject of compensation. We are of opinion that, as the benefits of education and the enjoyment of the greater comforts and conveniences of life depend upon the possession of pecuniary means, the loss of these advantages is one capable of being estimated in money; in other words, is a pecuniary loss. The loss of such advantages arising from the death of a father whose income ceases with his life is an injury in respect of which an action can be maintained on the statute. *A fortiori* the loss of a pecuniary provision, which fails to be made owing to the premature death of a person by whom such provision would have been made had he lived, is clearly a pecuniary loss for which compensation may be claimed. We are not insensible to the consequences in the event of death from negligence to a person of very large fortune. This is rather for the consideration of the Legislature than for us, whether any limit should be put to liability. We see no difference in principle between this case and the claim by the family of an artisan for the loss of advantages arising from their father's earnings, in which case it is not doubted that the action may be maintained." The Judges thought the damages too high, and rather than stand

a new trial Plaintiff accepted the Judges' suggestion and agreed to take £9,000, reducing the eight children's allowance to £1,000 each.—*Tried in Court of Queen's Bench, June* 17, 1862.—*From Law Journal Reports, vol.* 31, *page* 249.

The Company appealed to the Exchequer Chamber, where Chief Justice Erle affirmed the Judgment of the Court below (June 15, 1863).—32 *Law Journal, page* 377.

666. *Dickenson* v. *North Eastern Railway Company.*—Action by a grandmother on behalf of her daughter's illegitimate child, seven years of age. The mother of the child had been killed by an accident, and the grandmother, as mother of the deceased, recovered compensation for herself owing to having been partly supported by her daughter. The Judge (Mellor), however, held that nothing could be recovered on behalf of the illegitimate child. The grandmother appealed, and on the appeal case Chief Baron Pollock held that the word "child" in the Act (9 & 10 Vic., cap. 93) meant legitimate child. Judgment for Company.—*Tried in Court of Exchequer, Nov.* 6, 1863.—*From Law Journal Reports, vol.* 33, *page* 9.

667. *Alton* v. *Midland Railway Company.*—Action for loss of the services of Plaintiff's traveller for nineteen weeks, owing to said traveller having been injured on the Company's line by accident—Trent to Nottingham. Plaintiff contended his business had suffered great loss and injury by the absence of his traveller, and that the accident arose from negligence. The Company contended they made no contract with Plaintiff, but with his traveller, and that Plaintiff had no right of action. Chief Justice Erle and the other Judges held that Plaintiff, not being a party to the contract of carriage, could not recover. Judgment for Company.—*Tried in Court of Common Pleas, May* 30, 1865.—*From Law Journal Reports, vol.* 34, *page* 292.

668. *Austin* v. *Great Western Railway Company.*—Action for £50 for breaking Plaintiff's leg, Plaintiff being a child in arms of three years and two months old—Crumlin to Merthyr. Plaintiff's mother took a ticket for herself, but was unaware that it was necessary to take a ticket for the child. The Company's rules required that children between three and twelve years

should pay half-fare. No fraud was proved on the part of the mother. The Company admitted the accident was caused by negligence; but seeing they had not been paid for carriage of Plaintiff, and made no contract for his safe carriage, denied being liable. The case was first tried at the Monmouthshire Spring Assizes, before Baron Pigott, when the Jury gave a verdict for £50. The Company appealed, and on the appeal case Chief Justice Cockburn said—"I think Judgment must be against the Company. The contract is to carry safely both the mother and the Plaintiff. If that contract has been entered into under some misrepresentation on the part of the mother, she may be liable for the fare which she ought to have paid for the Plaintiff, or for any penalty to which she may be subject by any enactment or bye-law made under statutory powers. Her default does not alter the position of the Company, the contract being to carry mother and child. Through the negligence of the Company the Plaintiff was injured. I think the verdict right." Justices Blackburn and Shee concurred.—*Tried in Court of Queen's Bench, April* 18, 1867.—*From Law Reports, Queen's Bench, vol.* 2, *page* 442.

669. *Kearney* v. *London Brighton and South Coast Railway Company.*—Action for personal injury resulting from a brick falling out of a bridge over the Blue Anchor Road, Bermondsey, on to Plaintiff's shoulder. At the first trial the Jury gave Plaintiff a verdict for £25. The Company appealed to the Court of Queen's Bench, where the Judgment was given against the Company. The Company again appealed to the Exchequer Chamber, when Chief Baron Kelly affirmed the Judgment, holding that the Company were responsible by common law, irrespective of their duty to maintain, uphold, fence, and keep in repair the bridge or viaduct in question.—*Tried in the Court of Exchequer Chamber, June* 15, 1871.—*From Law Journal Reports, vol.* 40, *page* 285.

670. *Brown* v. *Great Western Railway.*—In the case of an action entered for personal injury, the Court will pass an order for the company, by their medical man, to examine the injured Plaintiff and ascertain the extent of the injuries.—*Tried in Court of Exchequer, April* 20, 1872.—*From Law Times Reports, vol.* 26, *page* 398.

671. *Skinner* v. *Great Northern Railway Company.*—Action for production of medical report. Plaintiff had been injured in an accident on the railway, and the Company's doctor had twice examined him. Plaintiff's solicitor sought for an order from the Court to require the Company to submit said medical reports to Plaintiff. It was held that they were privileged documents, and Plaintiff was not entitled to inspect them. Judgment for Company.—*Tried in Court of Exchequer, June* 11, 1874.—*From Law Journal Reports, vol.* 43, *page* 150.

672. *Bradshaw* v. *Lancashire and Yorkshire Railway Company.*—Action by executors for medical assistance and loss of business arising from J. J. Clough's illness and death. J. J. Clough, it was admitted, was injured in an accident to a train between Miles Platting and Manchester, 23rd December, 1872, such accident arising from the Company's negligence. Clough was a dealer in boots and shoes, and became for the next six months very ill owing to the bodily injuries he had received. Being unable to attend to his business, it fell off in consequence. He died on June 3, 1873, of smallpox, and not from the effects of the accident. The case was first tried at Manchester Spring Assizes, 1874, when the Jury found a verdict for £200, viz., £160 representing the loss of profit the personal estate of J. J. Clough had sustained, and £40 medical expenses. The Company appealed on the ground that the action was not maintainable against them.

On the appeal case Justice Grove said—"We feel bound by the case of *Potter* v. *Metropolitan Railway* (30 Law Times, 765, and 32 Law Times, 36), which is based upon the reasoning of this Court in *Knight* v. *Quarles* (2 B. & B., 102). I think no distinction exists between these cases and the present. It is clear that during his lifetime Clough's estate was diminished from two causes—first, he was compelled to incur medical expenses; and secondly, he was unable to superintend his business; and I think that the executrix may sue after his death on the ground that by the Defendants' breach of contract (safe carrying) the amount of assets coming to her has been lessened. In my opinion nothing in the 9 & 10 Vic., cap. 93 (Lord Campbell's Act), prevents the executrix from suing; no

right of action is taken away from an executor by that enactment. It has been urged that the maxim, *Actio personalis moritur cum personâ*, applies, and that the remedy dies with the person; but when bodily harm is sustained owing to a breach of a contract, two causes of action may accrue to the person injured—he may obtain compensation for his bodily sufferings, and also for such injury as his personal estate may sustain. I think that the remedy for the injury survives to the executrix; the present action, being founded *on a contract*, will lie after the death of the person who has sustained the pecuniary loss. The case of *Hadley* v. *Baxendale* has been relied upon as that the damage is too remote and not contemplated at the time of the contract between the two contracting parties. The Company may reasonably have contemplated at the time of his becoming a passenger that if he received bodily hurt by their negligence he would suffer loss in whatever business he might be engaged." Justice Denman concurred. Judgment against the Company.—*Tried in Court of Common Pleas, January* 22, 1875.—*From Law Journal Reports, vol.* 44, *page* 148.

673. *Herschfield* v. *London Brighton and South Coast Railway Company.*—Action for personal injury received in a collision. One of the Company's officers visited Plaintiff and got him to accept three guineas compensation in full of all demands. The officer stated Plaintiff's injuries were trivial and temporary, and if they should afterwards turn out to be more serious he would still, even if he executed the deed, be in a position to obtain further compensation. Plaintiff's case was that this was a fraudulent representation.

Justice Mellor said—"There has been a fraudulent representation of facts, and a fraudulent statement that the deed would not be binding under the circumstances which have arisen. There is no obstacle in law, and we are also now at liberty to act upon the rules of equity as to fraud. I am of opinion the Plaintiff is entitled to pursue his action for further compensation." Justice Lush concurred. Judgment against the Company.—*Tried in Court of Queen's Bench, November* 10, 1876. —*From Law Times Reports, vol.* 35, *page* 473.

674. *Berringer* v. *Great Eastern Railway Company.*—Action for loss of son's services by a father (a butcher), owing to the son having been injured in an accident. The son was a passenger, Fenchurch Street to Southend, by London Tilbury and Southend Railway. The accident occurred at Stepney Junction, owing to a collision with a Great Eastern train, and the Great Eastern Company's servants were at fault. The father sued the Great Eastern Company, although they were not the contracting company. It was held that a master cannot sustain an action against the contracting company for loss of his servant's services in such a case unless the master be a party to the contract of carriage. Justice Lopes held that the second company (Great Eastern) could be sued by the father upon an ordinary tort to recover for loss of his son's services.—*Tried in Court of Common Pleas, March* 11, 1879. —*From Law Journal Reports, vol.* 48, *page* 400.

CATTLE CASES.

(HORSE CASES SHOWN SEPARATELY.)

Cattle Delayed and Injured.

(These Cases are treated under "Special Contracts.")

Case No.

Crisp & Thompson v. *York Newcastle and Berwick* (1854)... ... 675
Cattle delayed—Company held not to be common carriers of cattle—Special contract exempted Company from liability.

Hughes v. *Great Western* (1854)... 676
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Snead v. *Shrewsbury and Hereford* (1855)... 677
Cattle arrived too late for a fair—Company held not liable under their notice of special contract.

Briddon v. *Great Northern* (1858) 678
Cattle delayed thirty hours owing to a snowstorm—Company held not liable.

Fay v. *City of Dublin Steamship Company* (1860) 679
Delay to cattle through stress of weather.

Fogarty v. Bagnalstown & W. Railway Company (1860) ... 680
Delay to through-booked cattle.

Drain v. *Henderson* (1860) 681
Cattle delayed owing to steamer helping a shipwrecked vessel.

Kearns v. *Harper* (1862)... 682
Delay to cattle through stress of weather.

Allday v. *Great Western* (1864)... 683
Cattle overcarried and delayed—Special contract note signed, but no option of higher rate offered—Company held liable.

Matthews v. *D. & D.* (1865) 684
Cattle delayed, Kells to Huntingdon, being short-shipped at Dublin.

Donohue v. *London and North Western* (1867) 685
Cattle delayed—Must be carried in reasonable time.

Rooth v. *North Eastern* (1867) 686
Cattle unloaded by owner at night time, strayed on line and killed by an engine—Company held liable, owing to station premises being insufficient to protect cattle let loose.

Case No.

Page v. *Great Northern* (1868) 687
Delay in shipping cattle at Dublin—Question of rotation in receipt, each lot being shipped in order as received.

Kirby v. *Great Western* (1868) 688
A condition in a special contract note not to be liable for delay is unreasonable and void—Sender's servant unable to read and signing a risk note binds his master.

Robinson v. *Dublin and Liverpool Steamship Company* (1869) ... 689
Injury to cattle at sea owing to rough weather.

Mallon v. *Irish North Western* (1870) 690
Cattle delayed—Special contract.

Jarman v. *Great Western* (1873) 691
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Burns v. *Dundalk and Newry Steam Packet Company* (1875) ... 692
Three cattle lost—Contract limited to Liverpool, loss took place beyond Liverpool.

Roberts v. *Midland* (1877) 693
Sheep too late for market.

Foreman v. *Great Western* (1878) 634
Cattle delayed—Contract note signed—Drover unable to read conditions of carriage—Held, Company not liable.

Ruddy v. *Midland Great Western* (1880) 695
Pigs carried at owner's risk did not exempt the Company from carrying them within a reasonable time; hence the Company was held liable for the delay.

Hill v. *London and North Western* (1880) 696
Company liable for only £2 for ram killed.

Gordon v. *Great Western* (1881) 697
Delivery of cattle withheld wrongly—Special contract did not exempt Company from liability.

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675. *Crisp & Thompson* v. *York Newcastle and Berwick Railway Company.*—Action for £50 for delay to two and a half trucks cattle, Alnwick to Newcastle. Plaintiffs, before 3 p.m. in the day, ordered and hired two and a half trucks, for which they paid, and three tickets were given them. The station-master, at the time Plaintiffs engaged the trucks, informed them there were no cattle trucks at the station, but he thought there would be some soon. By reason of the non-arrival of empty trucks a delay occurred, and the Newcastle market was lost. Plaintiffs pleaded the Company received the cattle as common carriers,

and were liable under the Common Carriers' Act. The Company denied this, and pleaded they received them under a special contract, one condition being printed on back of ticket, "that the Company would not be responsible for the non-delivery of the stock within any certain time, or in time for any particular market." The County Court Judge left it to the Jury whether the cattle were received by the Company as common carriers or under a special contract. The Jury decided the Company received the cattle as common carriers, and gave a verdict for £30. An appeal was made to the Common Pleas Court, and a special case set forth. On the appeal, it was stated the man delivering the cattle could not read, hence he could not have made a special contract. The Chief Justice held the County Court Judge should have issued a non-suit, and that it was misdirection to leave the point of contract to the Jury. He gave the Jury an opportunity of deciding against the Company contrary to law, and they did so. There was no evidence of the Company being common carriers of cattle in this instance. Mr. Justice Cresswell said—"I think there was no evidence for the Jury. The Judge, if he had done right, must have told them there was a special contract, and so there was an end to the case." Mr. Justice Williams was of the same opinion.—*Tried, on appeal, in Court of Common Pleas, Westminster, April* 28, 1854.—*From Law Journal Reports, vol.* 23, *page* 125, *C.P.*

676. *Hughes* v. *Great Western Railway Company.*—Action for loss of market of pigs through alleged delay, Southall to Birmingham, 12th November, 1853. The Plaintiff signed a risk note, one of the conditions being—

"The Company is not to be held responsible for the carriage or delivery within any certain or definite time, nor in time for any particular market."

The pigs left Southall by 3 a.m. train, and reached Didcot at 7.30 a.m., and there they remained for some hours, according to the arrangements of the Company, about which the Plaintiff knew nothing, and were taken by the next goods train on its way to Birmingham, where they arrived too late for the Thursday's market, and were sold at a considerable loss. No train except the express left Didcot going to Birmingham after the arrival of the pigs until the train by which they were actually sent forward. The case was first tried before Chief Justice Jervis, at

Warwick Spring Assizes, and he was of opinion that the Company, by sending the pigs by the first practicable train, had sent them within a reasonable time; and as the Plaintiff's counsel did not insist upon having the question left to the Jury, he non-suited the Plaintiff. The Plaintiff appealed on a legal point, when on the appeal case Justice Cresswell, with Justice Williams and Chief Justice Jervis, affirmed the non-suit, saying—"It is quite clear that the pigs were not received on the terms stated in the declaration, and the Judge ought to have told the Jury to find for the Company on the plea setting up the contract. It is sufficient for the purposes of our Judgment that the pigs were not received under the contract stated in the declaration, and therefore the non-suit ought not to be disturbed."—*Tried in Court of Common Pleas, May* 2, 1854. —*From Law Journal Reports, vol.* 23, *page* 153.

677. *Snead* v. *Shrewsbury and Hereford Railway Company.*—Action for damages for delay to 126 cattle, Leominster to Stamford, whereby they missed the fair. Plaintiff pleaded that on the 6th November he sent his man to Leominster Station to order a special train for the 8th November. This the station-master denied. The cattle were sent on from Leominster at 3.30 p.m. to Shrewsbury, and on by 8.30 p.m. train *via* Stafford to Rugby, where they arrived at 2 a.m., just too late for a cattle train leaving for Stamford. They were detained at Rugby till 7 a.m., and only reached Stamford at 10.30 a.m., too late for the fair. Plaintiff pleaded that the station-master at Leominster guaranteed that the cattle should be forwarded so as to reach Stamford early the following morning, in time for the fair. This the Company denied, and rested their case on the special agreement. Lord Campbell told the Jury that if the station-master made a verbal contract the action was maintainable, and could not be done away with by the subsequent printed notice after the verbal contract had been entered into, and after the cattle were loaded. He referred to the 17 & 18 Vic., cap. 31 (which had not come into operation at the time), and the clause introduced by Lord Derby requiring all contracts for conveyance of cattle and other things on railways to be signed by the parties. Verdict for Company.—

Tried before Lord Campbell and a Special Jury, April, 1855. —*From Clearing House Reports, page* 34.

678. *Briddon* v. *Great Northern Railway Company.*—Action for delay to two waggons cattle thirty hours at a station, whereby they were deprived of food and were too late for the market—Huntingdon to Nottingham. The detention arose from a heavy snowstorm. The engine was taken off the goods train to help a passenger train. The passenger service was continued by the aid of extra engines, and Plaintiff contended that the Company had extra engines at Peterborough, and as it was possible to keep the passenger traffic working by the aid of extra engines, the same should have been done for the goods train. The case was first tried at Nottingham, before Chief Justice Cockburn, who held that the question was whether the delay in forwarding *these beasts* was owing to the negligence or want of due expedition on the part of the Company's servants, or was the unavoidable result of the state of the line, they doing all that under the circumstances they were bound to do. The Jury found for the Company. Plaintiff appealed, and on the appeal case Chief Baron Pollock said—"The Jury found for the Company, and rightly. There is a distinction between trains for passengers and trains for goods or cattle. The owners of goods or cattle have no right to complain that extraordinary efforts to forward passengers are not used to forward cattle or goods. The rates of carriage are different, and the cattle or goods sent by goods trains pay a lower rate than they would if sent by passenger trains. The contract entered into was to carry the cattle to Nottingham without delay and in a reasonable time under *ordinary circumstances.* If a snowstorm occurs, which makes it impossible to carry the cattle except by extraordinary efforts, involving additional expense, the Company are not bound to use such means and to incur such expense." Barons Bramwell, Watson, and Channell concurred.—*Tried in Court of Exchequer, November* 9, 1858.—*From Law Journal Reports, vol.* 28, *page* 51.

679. *Fay* v. *City of Dublin Steamship Company.*—Action for £224 loss from missing Manchester market with 104 cattle, shipped in steamship "Trafalgar" from Dublin for Liverpool.

Captain Geary swore the weather was so bad he had to put back into Kingstown on the Monday night, and subsequently on Tuesday to Dublin. The Chief Justice was of opinion that the return of the steamship was justified by the severity of the weather, leaving it for the Jury to judge whether the same cause prevented the steamship starting on Tuesday, or for want of coals, the Company having no depôt for fuel at Kingstown. Verdict for Company.—*Tried before Chief Justice Lefroy, Kildare Assizes, March* 14, 1860.

On appeal to Queen's Bench for new trial, their Lordships said they would not interfere with the finding of the Jury, but that with one branch of claim, namely, £32 for provender, some legal difficulty arose that might lead to expensive litigation. Ultimately the verdict was allowed to stand, each party bearing their own costs.—*From Irish Clearing House Reports.*

680. *Fogarty* v. *Bagnalstown and Wexford Railway Company.*—Plaintiff claimed £20 for loss of sale at a fair through delay to cattle, Borris to Carlow. The Chairman of Bagnalstown Quarter Sessions dismissed the case, and this was the Assize appeal. The delay was admitted, and arose from the breakdown of an engine on the single line. Company pleaded they booked cattle at a through rate at a less charge than local booking to their junction, in consideration of a special contract note being signed, namely—

"I request that you will book my cattle through to Carlow Station, and I will not hold the Company responsible for any delay that may take place on the journey."

Plaintiff pleaded negligence on Company's part that could not be covered by risk note. The dismiss was affirmed, with costs. —*Tried before Justice Keogh, Carlow Summer Assizes*, 1860.—*From Irish Clearing House Reports, No.* 18, *page* 23.

681. *Drain* v. *R. Henderson & Son.*—Plaintiff shipped eleven cattle in steamship "Vanguard," Belfast to Fleetwood, the cattle being for Bolton market. Plaintiff's drover signed the Company's ordinary risk note, in which it was stated Defendants' steamship was at liberty to tow and assist vessels. Off the Isle of Man the "Vanguard" fell in with the "Royal Arch" exhibiting signals of distress. The "Vanguard" turned back

and towed the "Royal Arch" into Belfast, the nearest safe port. Plaintiff pleaded he lost his market from the delay, that his cattle were injured, and were sold at considerable loss. *Justice Fitzgerald and a Special Jury tried the case at the Armagh Summer Assizes*, 1860. The Judge directed the Jury that if the facts of the defence were, in their opinion, true, Defendants were entitled to the verdict. Verdict given accordingly. On appeal to *Court of Common Pleas*, *20th November*, 1860, and the case being fully argued, the Court upheld the verdict of the Jury.—*From Irish Clearing House Reports*, *No.* 20, *page* 25.

682. *Kearns* v. *James Harper, Agent of Steamship Company.*—Plaintiff claimed £40, or 50s. each, for deterioration, through four days' delay, on sixteen cows, Sligo to Liverpool. The "Shamrock" steamship was advertised to sail on 7th November, unless from some *unforeseen occurrence.* Defendant refused the cattle on 7th, when tendered. The steamer sailed on the 8th with the cows. On the 10th a gale overtook the steamer, leading to injury of cattle, delay, and loss of Liverpool market. The steamer had only reached Sligo from Liverpool on the 7th with an unusually heavy and extraordinary cargo. Evidence was given as to the cargo and the exertions made to unload it. The Judge said the case turned upon the words "unforeseen occurrence," and, considering the cargo was beyond an ordinary one, he confirmed the dismissal of the case. This was again tried by Baron Fitzgerald, at Sligo Spring Assizes, 1862.—*From Irish Clearing House Reports.*

683. *Allday* v. *Great Western Railway Company.*—Action for £15 for thirteen beasts, Oxford to Bordesley Station, Birmingham, being overcarried to Hockley Station, Birmingham, and when found by Plaintiff it was too late to take them to the market at Birmingham, and the cattle were injured by having been kept for several hours in the trucks without food or water. The Company relied upon the special consignment note signed by Plaintiff, as follows:—

"Received from Allday the undermentioned animals, on the conditions stated below, and at special *reduced charge* below the rates authorised by law. The loading and unloading is to be performed by the sender, and any assistance voluntarily given by the Company's servants to be at the risk of the owner. The Company are not to be subject to any risk in receiving, loading, forward-

ing or transit, and unloading; nor to be amenable for any damage, actual or consequential, arising from suffocation, from being trampled on, bruised, or otherwise injured from fire or any other cause whatsoever; nor for any consequences arising from overcarriage, detention, or delay in or in relation to the conveying or delivery of the said animals, however caused. The Company is not bound to send the animals by any particular train, or to carry or deliver them within any certain or definite time, or in time for any particular market. If, on the arrival of the cattle and other animals at their destination, no one shall be ready to receive the same on behalf of the consignee, the Company will, at the discretion of the superintendent of any station, send such animals into yards or other convenient places, at the expense and risk of the sender or consignee, and if not claimed within seven days, the same will be sold to defray expenses and pay charges. In order to guard against disappointment, the public are recommended to give two clear days' notice of their intention to send cattle from any station, so that the Company may, if possible, provide trucks; and to afford time for receiving and loading such cattle and stock, they should be at the station not less than two hours before the departure of the train by which they are intended to be conveyed. *N.B.*—The conditions cannot be altered or dispensed with by any person whomsoever."

The case was tried at the Warwick Summer Assizes, 1864, when the Judge held that the conditions were unreasonable, and a verdict was given for £15, with leave to move for a new trial. The new trial came on, when Chief Justice Cockburn gave Judgment for Plaintiff, and against the Company. He said—"If the statute (Railway and Canal Act) applied in case of loss by overcarriage, I should have been disposed to grant a new trial. But it is not necessary to go into that question, as the Company admit there was evidence of injury to the cattle from delay. The special contract is certainly not reasonable. It is not merely that the Company will not be responsible for delay, not only for overcarriage generally and not limited to accidental circumstances independent of delay caused by the Company, but they claim absolute immunity from all injury arising from delay caused by their own negligence. This I take to be an unreasonable condition, unless something appears that might make it inequitable to the sender to seek to exact from them the full extent of the ordinary carriers' liability. The Company may say, 'We make this special contract: we will carry these animals for a lower price if you will release us from the liability attached to carriers, and will take your chance of the goods arriving at their destination.' If a man enters into such a contract, it is

unreasonable to say he is not bound by it. But although the expression *reduced charge* occurs in this contract, it does not appear to have been used with reference to a greater rate by which the sender might have gained additional security. The condition is, on the face of it, therefore, unreasonable, and the learned Judge at the trial was right in so holding." Justice Crompton concurred. Judgment against Company.—*Tried in Court of Queen's Bench, Michaelmas Term, November* 2, 1864.—*From Best and Smith's Reports, vol.* 5, *page* 903.

684. *Matthews* v. *D. & D. Railway Company.*—Action in respect to the delay of cattle, Kells to Huntingdon. The cattle were carried under special contract, but were short-shipped at Dublin, which led to a loss of market. One of the conditions of the contract was—

"The Company will in no case be responsible for any damage to live stock arising from overcrowding of any waggon, or for the delivery of cattle or live stock at any particular time or for any particular market."

Held—That such stipulation did not qualify the implied contract to deliver within a reasonable time, but only prevented the question of reasonable time from being affected by the express wish of the sender to have his cattle delivered at a particular time or for a particular market. The sailing bills of the London and North Western Railway Company, whose vessels formed a link in the through-booking system, contained a condition as follows:—

"Cattle to be forwarded by this route are received subject to this express stipulation, that if it shall be found, on the arrival of the cattle in Dublin, that there is not room for the conveyance of the cattle by the next ordinary vessel of the Company proceeding to Holyhead, the Company shall not be bound to forward the cattle until the sailing of the ordinary vessel next following that of the vessel in which there shall not be room for the cattle."

Held—That it was a question for the Jury whether, upon the evidence, the contract between the parties had been made subject to the above stipulations or not. Judgment accordingly. —*Tried in the Court of Exchequer (Ireland), November* 11, 1865.—*From Irish Common Law Reports, vol.* 17, *page* 87.

685. *Donohue* v. *London and North Western Railway Company.*—Action for £20 for delay to cattle, Dublin to

Sheffield. The cattle left Dublin 7 a.m. Saturday morning, and reached Holyhead about 12.30 p.m., and were unloaded about 2.30 p.m., and kept in the fields near the station until about 12 noon Sunday, when they were sent on by a special train. There was no regular train, Holyhead to Sheffield, after the arrival of the cattle until Monday after 10 a.m. The question turned upon whether the Company were responsible to send forward the cattle on Saturday by a special train, as well as sending them forward by a special train on Sunday, or whether they were only responsible to send them forward by the next ordinary train going to Sheffield on the Monday. The agent at Holyhead said he was short of trucks on Saturday night, and had sufficient trucks come in on Saturday night he would have sent the cattle forward on the Saturday night. On the first trial the Jury found there had been unreasonable delay at Holyhead, and gave a verdict for £20. The cattle had been booked in Dublin on the Friday, but could not be shipped on the Friday. They were required for the Monday's market in Sheffield.

On the appeal case Chief Baron Pigott said—"The question was whether there should have been a peremptory direction by the Judge to the Jury that the Company was excused from sending the cattle by what is called 'an ordinary train.' The agent in Holyhead stated on cross-examination that what prevented, and what alone prevented, the transmission of those cattle, not only from Holyhead, but to Sheffield, was the want of trucks; and if the Jury thought so, the verdict was justifiable. We must not be supposed to decide that the Company is always bound to send on cattle by a special train—that circumstances, otherwise unreasonable, may not become reasonable in consequence of the exigencies of the line. But, in the absence of any such defence, we must hold that there was nothing of the kind for the Jury to act upon. There was no evidence of what an ordinary train was; and, independently of that, there was proof that the cattle would have been sent forward by the traffic agent in the ordinary course of business if trucks had been there to send them forward." Judgment against Company.—*Tried in the Court of Exchequer (Ireland), April* 27, 1867.—*From Weekly Reporter, vol.* 15, *page* 792.

686. *Rooth* v. *North Eastern Railway Company.*—Action for £67 for cattle killed on the line by an engine at Chesterfield, just after being unloaded at night time from a truck. The cattle (eight heifers and five cows) were sent from Borough Bridge, and were accompanied by the owner's drover, who rode with them on a free pass, and who, with owner's nephew, assisted in unloading them. There was only room for one truck at a time opposite the planking by which the cattle walked out of the truck on to the ground, and the cattle unloaded from the first truck had to stand unprotected by any pound or enclosure while the second truck was pushed into position opposite the landing-place. During this interval the cattle strayed on to the main line and were killed. The drover gave up the cattle ticket before he commenced to unload the cattle. On the cattle ticket accepted by the drover were conditions of carriage, viz.—

"The bearer undertakes all risk of loading, unloading, and carriage, whether arising from the negligence or default of the Company or their servants, or from defect or imperfection in the station, platform, or other place of loading or unloading, or of the carriage in which they may be loaded or conveyed, or from any other cause whatsoever.

"The Company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with and to take care of them."

The Company contended that this notice relieved them from liability in this case, and that they had made delivery of the animals before they had been killed. The case was first tried at the Derby Assizes, when the Jury found for Plaintiff £67 damages, finding that there had been no complete delivery of the cattle to Plaintiff, and that the place at which the cattle were delivered was not a safe and proper place for the delivery of cattle. The Company appealed, and on the second trial Chief Baron Kelly said—"Where an advantage (*i.e.*, free pass for drover) conferred upon the owner of cattle disentitles him from complaining of the unreasonableness of a condition, an alternative must be presented to him. The alternative must be of accepting the advantage proffered, and relieving the Company of a portion of their liability, or of rejecting the advantage proffered and holding the Company to their common law liability entire and unlimited. Now here

no such alternative was offered. I am not prepared to say that the provision that the owner undertakes all risk of loading and unloading would be in itself unreasonable. If the Company think fit to commit to the owner himself, or to his servants, the business of putting the cattle into the trucks and afterwards unloading them, I certainly do not see why, if the owner of cattle is willing to take that part of the business, a stipulation on the part of the Company that they shall not be liable, even for any negligence committed by their servants in relation to that part of the conveyance of the cattle, should be considered unreasonable. It is contended that the delivery of the cattle was completed upon their quitting the trucks because the cattle drover and the nephew attended to convey them away the moment they stepped out of the trucks. But even if there had been a perfect and complete delivery, it did not discharge the Company from their liability to provide a safe and sufficient means of exit for the cattle. The sole subject substantially left to the Jury to decide was whether the Company had fulfilled their common law obligation—which, in my opinion, nothing in this case shows to be limited—of providing a safe means of exit for the cattle." Baron Martin said—"If the thing carried had been an inanimate thing, to be delivered into the hands of the person to whom it was sent, it might have been a different matter; but these were cattle that were merely let loose on the carriers' premises. It is a perfect fallacy to call that a delivery, so as to put an end to the liability of the Company, if the yard was not a safe place. If the cattle were injured by reason of the negligence of the carriers, and not of the drover, they are in the same condition as if there had been no drover at all." Judgment against Company.—*Tried in Court of Exchequer, January* 25, 1867.—*From Law Journal Reports, vol.* 36, *page* 83.

687. *Page* v. *Great Northern Railway Company.*—Action for delay of cattle, Dublin to England. It was the usage of the Company that cattle should be booked for carriage in the order in which they were delivered in the Company's yard, and that they should be forwarded in the same priority. This usage was known to the Plaintiff and his servant. Between

three o'clock and four o'clock on the morning of Sunday, the cattle in question were brought to the Company's yard, and Plaintiff's man found the gate locked. Carter, the Company's night porter, was ill in bed, and told Plaintiff's man through the window that it was better for him to take the cattle to grass at that hour of the night, and that he (Carter) would see that they were booked next morning as of the time that they were so brought to the yard. About twelve o'clock noon, Sunday, Plaintiff's man went to Connell, the booking clerk, and Connell, being told by Carter what had occurred the night before, booked the cattle, *knowing that they were not in the yard.* Plaintiff's cattle were brought into the yard on Monday morning about seven o'clock, but a quantity of cattle had been put into the yard on the Sunday afternoon; the consequence was that 71 of the Plaintiff's cattle were not shipped in turn nor until Tuesday, and were seriously injured by the delay.

Chief Justice Monaghan, on appeal, said—"We are of opinion that there is nothing to take this case out of the principle—for which abundant authority was cited during the argument—that when an agent is entrusted with certain duties, the public have the right of acting on the supposition that he is not violating his duty when doing any act not within the scope of his duty, and that the principal be bound by such an act, though it be contrary to his instructions, the person dealing with the agent not knowing that he is disobeying his orders. Here Connell was a booking clerk whose duty it was to book cattle. He conceived he had authority to consider what had been done as equivalent to a delivery in the yard, and he booked the cattle as if delivered. Anyone might naturally suppose that he was acting within the scope of his authority, and the Jury have found, as a matter of fact, that the Plaintiff was not aware that he was acting contrary to his duty." A verdict, £50 against the Company, given in the Court below, was affirmed.—*Tried in the Court of Common Pleas (Ireland), January* 22, 1868.—*From Irish Common Law Reports, vol.* 2, *page* 228.

688. *Kirby* v. *Great Western Railway Company.*—Action for delay and damage to cattle, and one beast dead.

Plaintiff had been promised waggons for his cattle at the station (name not given) on the Monday afternoon; the trucks, however, were not forthcoming, and the cattle did not get to their destination until Wednesday morning. Plaintiff's servant, who was unable to read, had signed the usual risk note, and one of the conditions set forth was—

"That the Company shall not be answerable for any consequences arising from overcarriage, detention, or delay in the conveying or delivering of cattle in time for a particular market, however caused."

Baron Martin held that the Plaintiff's servant's signature was sufficient to bind the Plaintiff. "It would be dangerous to hold that because the man who signed the note did not know its contents the contract would not be valid, when he was sent for the express purpose of making the contract under which the cattle were to be carried. As to the conditions, my opinion is well known that the conditions must be treated as a whole, and if part is unreasonable, the whole is bad. This particular condition has, however, been held unreasonable in *Allday* v. *Great Western*, which I am bound to follow. If railway companies will persist in inserting conditions which have been condemned by the Courts of Law, they must take the consequences. As long as I can remember, and probably half a century before, there were always squabbles about carriers' notices. Railway companies continued these notices until they were put an end to by the Act (17 & 18 Vic., cap. 31, sec. 7). If a railway company claims to make special conditions, they must make such as are reasonable as a whole. These conditions are not reasonable as a whole. But if the injury to the cattle arose from want of food, the carrier was not liable for that, any more than if a parcel insufficiently packed were lost in the carriage through insufficient packing. The owner was bound to see to feeding his cattle. With respect to the cow that died the question was the same. If it died from exhaustion consequent on want of food the Company were not liable." (*N.B.*—It would appear the delay took place at the sending station for want of trucks, and where Plaintiff could have fed his cattle.) Judgment against Company.—*Tried in Court of Exchequer, June* 19, 1868. —*From Law Times Reports, vol.* 18, *page* 658.

689. *Robinson* v. *Dublin and Liverpool Screw Steamship Company.*—Claim for £80 for a cow and for damage to eleven other cows on sea journey, Dublin to Liverpool. The steamer encountered a heavy southern gale, which drove the sea across the deck, and the cattle on the deck were knocked down. Plaintiff pleaded that Company agreed to carry cattle (1) safely and securely, (2) with reasonable diligence, and (3) without negligence and mismanagement. Company denied first plea, and maintained they had fulfilled pleas 2 and 3. Company maintained the cattle were received on condition that they should not be answerable for any damage during the voyage by the dangers of the sea. Verdict by Jury for Company on their pleadings.—*Tried before Baron Deasy and Special Jury, Court of Exchequer, Dublin, July* 2, 1869.—*From Irish Clearing House Reports, No.* 45, *page* 83.

690. *Mallon* v. *Irish North Western Railway Company.*—Action for £20 for eleven cattle, Enniskillen for Lisburn, being delayed at Clones Junction and missing connection with Ulster train. The Company booked cattle only to Clones, taking payment to that point only. On cattle ticket was written "For Lisburn," so that cattle might be handed over to Ulster Company, no drover being in charge. The train reached Clones 11.50 a.m., and the waggon was attached to engine to be shunted on to Ulster Company's siding, but, owing to the distance signal being up, it was not put on until 12.20 p.m., and did not get forwarded until 6.5 p.m., arriving at Lisburn 8.30 a.m. next day.—*Tried before Barrister at Omagh Quarter Sessions.* Verdict for Plaintiff on the ground of acceptance of the through contract to Lisburn.—*On appeal, before Chief Justice Whiteside, at Omagh Assizes, March,* 1870, verdict for Company. Court held the contract was only to Clones. Plaintiff relied upon "For Lisburn" being on cattle ticket. Plaintiff's man signed conditions of carriage with his cross, being unable to read or write. Plaintiff contended he (the man) was thus unacquainted with the conditions, and no special contract was made. The Court held that the contract was as good and as binding as if the conditions had been read over and signed by a man who could write, and that, the conditions

having been subscribed to by sender's agent, there was no question as to reasonableness or otherwise. Decree reversed, with costs.—*From Irish Clearing House Reports, No.* 48, *page* 89.

691. *Jarman* v. *Great Western Railway Company.*—Action for injury done to cattle by negligent detention. The contract to carry was at owner's risk, with the condition as to wilful misconduct on the part of the Company's servants, and the Plaintiff stipulated to pay the lower rate. The case was first tried before Baron Bramwell, at the Cambridge Assizes, November 5, 1873, and the learned Judge non-suited the Plaintiff. Plaintiff appealed, but the Court was unanimously of opinion that the rule should be refused, Justice Blackburn observing that evidence of negligence was not necessarily evidence of wilful misconduct. "If," said the learned Judge, "the Railway Company, having had distinct notice that the running of their trains was very dangerous indeed, owing to the badness of the points, and they were to continue to run their trains without the slightest attempt to put the matter right, that, I should say, would be clearly wilful misconduct."—*From the Weekly Reporter, November* 29, 1873, *vol.* 22, *page* 73.

692. *Burns* v. *Dundalk and Newry Steam Packet Company.*—Claim for three small cattle lost, Warrenpoint to Cambridge. Plaintiff booked eighteen cattle, and pleaded the Company were the contracting party to Cambridge, and did not deliver to Great Northern Company at Liverpool the three cattle. The Company produced the quartermaster, who proved he tallied eighteen cattle on to the quay at Liverpool. This was an appeal from a dismiss by Chairman of Newry Quarter Sessions. The Judge held that the special contract of Company limited their liability to the sea voyage, and affirmed the decision of Court below.—*Tried before Baron Fitzgerald, at Downpatrick, March,* 1875.—*From Irish Clearing House Reports, No.* 66, *page* 133.

693. *Roberts* v. *Midland Railway Company.*—Action for damages for sheep missing market, Bedford to Northampton, and Bedford to Hitchin. At the time of delivery of the sheep

sender did not communicate that the sheep were required for a particular market; but, on delivery of the sheep to Company, sender had asked the Company's foreman at Bedford, who said "the first train was away at 4 a.m., and would arrive at Northampton at six." The sheep had not arrived until twelve o'clock, or about an hour before the close of the markets, and hence sender's loss. The County Court Judge non-suited Plaintiff.

On the appeal case Justice Grove said—"I think that this order must be for a new trial. On the authority of *Blanche* v. *London and North Western*, it seems to me that three hours' delay is sufficient to call for an explanation on the part of the Company. The decision of the County Court Judge seems to have gone on the absence of proof of damage, which was a question for the Jury."—*Tried in the Court of Common Pleas, Feb.* 2, 1877.—*From Weekly Reporter, vol.* 25, *page* 323.

694. *Foreman* v. *Great Western Railway.*—Action for £40 for delay to 70 cattle out of a lot of 110, whereby their health was so injured that their value was diminished—Bristol to Battle, on South Eastern Railway. The Great Western Company (Defendants) only professed to carry as far as Reading. The case turned on the question of owner's risk and Company's risk rates. Sender's drover (Honeysett) was an illiterate man, unable to read, and he accompanied the Company's checker, at his request, to the goods office at Bristol, and signed the usual owner's risk consignment note. The Company proved that the rates at which they would carry cattle were posted up at the Bristol office. The charge for the cattle at owner's risk to Reading was £18 8s. 6d., while at the Company's maximum toll, at Company's risk, the charge would have been £75 7s. 4d. This rate as a whole had never been charged, nor was it shown in the rates book; but it was posted at the office. The case was first tried at the Michaelmas Sittings, 1876, in Middlesex, before Chief Baron Kelly and a Special Jury, when a verdict was found against the Company for £40; but leave was reserved to Company to move to enter a non-suit, or a verdict in their favour, on the ground that the contract signed was reasonable. On the appeal case Plaintiff contended there was not sufficient to show he had the option of the two

rates, and if there was, it was not a real option, but an unfair and unreasonable one; the lower rate being so low, cattle dealers invariably avail themselves of it, which was evidence the higher rates were prohibitory; that he (Plaintiff) was not liable on the alleged contract, for the drover did not, nor could he, read the contents of the note he signed. He quoted *Gallagher* v. *Great Western* (Irish Law Reports, 8 C.L., series 326) and *Peek* v. *North Staffordshire*. The Company contended Plaintiff had the option of two rates, and quoted *Parker* v. *South Eastern* (2 C.P. Div., 417), *Harris* v. *Midland* (25 W.R., 63), *Lewis* v. *Great Western* (3 Q.B. Div., 195).

Baron Cleasby read the Judgment of the Court (Chief Baron Kelly and Barons Cleasby and Pollock)—"The Company set up as a defence a contract in writing, signed by Plaintiff's agent, exempting the Company from liability, except for wilful misconduct. A question arose whether the Plaintiff was bound by the contract, seeing his agent could not read the document. It was in the usual form of consignment note, and the man who signed it (Honeysett) had brought beasts on more than twenty occasions, and had always signed similar documents. The Plaintiff knew the drover always signed similar documents. Under these circumstances, the Plaintiff, who sends a person to sign a document, is in the same position as if he had signed it himself, and, in the absence of fraud, is equally bound by it, whether he reads it or not. The Plaintiff, who sent such a person to sign the document, would not alter his own position by sending an illiterate person. The exact question arose in *Kirby* v. *Great Western* (18 L.T., N.S., 658). In that case, the servant who signed was unable to read, and stated he was ignorant of the contents; but Baron Martin held his signature sufficient. He said—'It would be dangerous to hold that because the man who signed it did not know its contents the contract would not be valid, when he was sent for the express purpose of making the contract under which the goods were to be carried.' And we adopt what is said by Lord Justice Mellish in *Parker* v. *South Eastern*, (2 C.P. Div., 421)—'In an ordinary case, where an action is brought on a written agreement which is signed by the Defendant, the agreement is proved by proving his signature; and, in the absence of fraud, it is wholly imma-

terial that he has not read the agreement and does not know its contents. The parties, however, may reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement without signing it; but in that case there must be evidence—independently of the agreement itself—to prove that the Defendant has assented to it. In that case also, if it is proved that the Defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the Defendant had not read the agreement, and did not know its contents.' But then, as to the conditions being reasonable—upon the question of there being an option we have, in the first place, the signed conditions which expressly offer the option, and it must be false unless such option existed; and as these conditions had been in general use for a long time, and have been adopted by the Plaintiff, there ought to be some foundation for the conclusion that the statement in them is illusory. There is, then, the fact that the ordinary rates of carriage, with the carriers' usual responsibility, as appointed to be taken by the Company, were stuck up in the office; and as to these rates, there is no dispute that they were within the limit which the Company, by their Acts of Parliament, were authorised to take. There is, then, the evidence of Storer, the superintendent, saying that if the Plaintiff had declined the conditions in the consignment, he would have tendered him a general consignment note upon usual terms; so that the fact of there being some option given between two rates and two contracts seems conclusively established, and there would be no necessity for leaving this question to the Jury.

"Plaintiff pleaded the option was not a real one, because it was said the two rates were not available by reason of the higher rate being so high as to be practically prohibitory. We think, *à priori*, the charges within the parliamentary limit are not unreasonable or prohibitory. We are clearly of opinion that the mere fact that the lower rate was so low that dealers invariably availed themselves of it is no evidence that the higher rate was unreasonable or prohibitory. There is, therefore, no ground for impeaching the contract as unreasonable upon the objection last taken."

The learned Judge approved of the decisions in *Gallagher* v. *Great Western*, also *Lewis* v. *Great Western*, and concluded by giving Judgment for the Company.—*Tried in Exchequer Division, Feb.* 8 *and March* 4, 1878.—*From Law Times Reports, vol.* 38, *page* 851.

695. *Ruddy* v. *Midland Great Western Railway Company.*—Action for £36 15s. 8d. for delay and loss of market of 40 pigs, Sligo to London, on a through contract. The pigs left Sligo 28th October, arrived at Dublin on 29th October, but, owing to a large quantity of cattle at Dublin waiting shipment, these pigs could not be shipped to Holyhead until 30th October at 12.30 p.m. They arrived at Holyhead that evening, and remained there until the following day, the 31st October, and left Holyhead by an express goods train 12.15 p.m., reaching London 10 a.m., November 1, and were delivered that day at 1.30 p.m. Sender had the option of two rates, and selected and signed the lower, at owner's risk, as follows:—

"CONTRACT (No. 2).—*To be signed for Oxen, Sheep, Calves, and Pigs, when shipped at Owner's sole risk, at the reduced rates of carriage.*—It is hereby agreed between the undersigned and the London and North Western Railway Company that the animals named on Cattle Ticket No. ——— are to be conveyed on the land part of the journey only upon the conditions of carriage applicable thereto, stated upon the cattle ticket handed to the undersigned by the Company's agent; and to be conveyed on the sea part of the journey, in consideration of the *reduced rate* charged, at the *owner's sole risk,* as stated in the conditions of carriage applicable to the sea journey, which conditions are—'That the Company, in consideration of the reduced rate of freight charged, will not be accountable for any loss caused by delay or injury to live stock taking place before or at shipment, on the passage, or at or after landing; nor for any loss of or injury to live stock, whether arising from, or consequent upon, the dangers or accidents of the seas, rivers, harbours, or navigation; or from the act of God, the Queen's enemies, pirates, restraints of princes, rulers, or people, jettison, barratry, collision, stranding, fire, improper, careless, or unskilful navigation; or from accidents connected with machinery or boilers; or from any fault, negligence, or mistake of the master, pilot, officers, seamen, or crew of the vessels, or other servants of the London and North Western Railway Company, owners of the vessels.'

"In cases in which the Company book cattle or live stock through they only receive such on conditions of there being room on board the steamer, and the Company are not liable to keep or feed any cattle or live stock until the sailing of the ordinary vessel next following, and the risk and expense of keeping the stock shall in all cases be borne by the owner."

The case was first tried before Justice Lawson, Hilary Sittings, 1880, when the Judge directed a verdict for the

Company, reserving leave to the Plaintiff to move to have the verdict entered for him for £36 15s. 8d., being the contingent assessment of damages, in case the Divisional Court should be of opinion that the case ought to have been left to the Jury upon any other issues raised by the pleadings.

Plaintiff appealed, and on the appeal case Chief Baron Palles said—"There are two counts—(1) Alleging a contract to carry in time for a particular market in London; (2) a contract to carry within reasonable time. We base our Judgment entirely upon the count alleging a contract to carry within a reasonable time. It is admitted that there was a contract to that effect. Two defences are presented—(1) That the cattle were carried and delivered for the Plaintiff in a reasonable time; (2) that there was a reasonable condition in the contract for carriage signed by the Plaintiff which exempted the Company from liability in respect of matters other than 'wilful misconduct,' and that the loss did not happen by reason of their wilful misconduct. I think it more convenient to discuss the second question first. The ground of the decision in *Sheridan* v. *Midland* (not reported) was that the 7th section of the 17 & 18 Vic., cap. 31, *primâ facie* renders railway companies responsible for negligence, but by a proviso enables them in certain cases to take themselves out of that general enactment, and that by the general rules of pleading it lies upon the company to bring themselves within the proviso of the Act. Now there is no doubt that, by the offer of a reasonable alternative, a condition *primâ facie* unreasonable may become reasonable (option of two rates); and therefore, treating this as a good plea, the question fairly arose at the trial whether, as a matter of fact, such an alternative was offered to the Plaintiff. I am of opinion that the proof of the existence of such an alternative lay upon the Company. In my opinion, so soon as it is shown that the onus lies upon the Company, there is an end of the case. The party upon whom the onus lies can never ask the issue to be withdrawn from the Jury (as done on first trial), unless there is an admission by the opposite party of facts sufficient to discharge the onus. It appears Plaintiff signed two documents—(1) the cattle ticket for the land journey, (2) the special agreement for the sea risk

—both of which were given in evidence. The time that he signed the document which is called the 'second document' is not distinctly stated. The time that he signed the document which is called the 'legal ticket' appears to have been when the clerk asked him whether the cattle were to be sent at the high rate or the low rate. It appears to me that if a person signs two documents as to the terms upon which a certain thing is to be carried, that he then pays his money, and that there are inconsistent provisions in the two documents, it must be for a Jury to determine the exact terms upon which the goods in fact were sent. No doubt, once a written contract has been proved, parol evidence is not admissible to vary that contract. Here every argument which can be urged to show that the carriage took place upon the terms contained in the paper A is equally cogent to prove that it was upon the terms contained in the other document. Upon that ground alone I am of opinion that there was a question for a Jury—whether the two rates offered must be reasonable to render the alternative reasonable; whether the two rates are reasonable *inter se* must be for the Jury.

"In my opinion the law has been rightly laid down by Lord Blackburn, and that in every case it lies upon the company to show that the higher rate is a reasonable rate.

"Was there evidence to go to the Jury that the cattle were not delivered in reasonable time? In the absence of evidence of the ordinary time of arrival, I would have great difficulty in holding that the dates during which the cattle were carried were not within reasonable time. The Plaintiff's case as to this point rests upon Mr. Sheridan's letter to Plaintiff, viz.—

'Mr. Skipworth writes that the pigs arrived in Dublin on 29th October, but as the Midland Great Western Company only advised us about half an hour before they arrived, and having more on hand than could be shipped that day, they were not sent forward until 30th October.—Yours truly, JOSEPH SHERIDAN.'

In my opinion that letter is evidence, and cogent evidence, to go to the Jury that the delay was unreasonable. For these reasons I am of opinion that the verdict ought to be changed into a verdict for the Plaintiff, and that he ought to have Judgment for the sum mentioned in Justice Lawson's reserva-

tion." Baron Dowse concurred. Judgment against Company. —*Tried in the Court of Exchequer, June* 29 *and* 30, 1880.—*From Law Reports (Ireland), vol.* 8, *page* 224.

696. *Hill* v. *London and North Western Railway Company.*—Action for £10 for injury to a ram, Aylesbury to King's Langley. No declaration as to the value of the ram was made at the time of delivery, but at the back of the ticket was a notice that the Company would not be responsible for loss or injury to sheep over £2, according to section 7 of Railway and Canal Act. The County Court Judge gave Plaintiff a verdict for £10. The Company appealed, when Judge Denman said —"The Judgment must be for the Company. The ram has been destroyed in consequence of injury sustained by reason of the neglect of the Company's servants in delivering. A case of neglect is within the Railway and Canal Act, and this injury is undoubtedly within this proviso. It is therefore impossible to contend that the animal's full value may be claimed without any declaration of value having been made, because it happens that in this particular case there has been no contract in writing." Judgment for Company, reducing verdict to £2.—*Tried in Court of Common Pleas, April* 30, 1880.—*From Law Times Reports, vol.* 42, *page* 513.

697. *Gordon* v. *Great Western Railway Company.*—Action for £35 for delay and injury to ten cattle, Waterford to Gloucester. The carriage had been prepaid at Waterford, but through some mistake the Company wrongly demanded the carriage at Gloucester, not knowing of or recognising the prepayment at Waterford. The cattle were delivered in Waterford 6th April, and arrived at Gloucester late in the evening of 7th April, and were unloaded, penned, and fed. On the morning of 8th April consignee's drover applied for the cattle, but the Company refused to deliver them without the carriage. On the 9th April the error was discovered, and the cattle then delivered to consignee.

The case was first tried at the Gloucester County Court, and the Company pleaded exemption from liability owing to the

cattle being carried at "owner's risk." The Plaintiff had signed a special contract note with the following condition:—

"The Company are not to be liable in respect of any loss or detention of or injury to the said animals, or any of them, in the receiving, forwarding, or delivery thereof, except upon proof that such loss, detention, or injury arose from the wilful misconduct of the Company or its servants."

The Judge of the County Court refused to non-suit Plaintiff, and gave a Judgment for £35 on the ground that, although no "wilful misconduct" on the part of the Company's servants had been proved, their conduct amounted to refusal to deliver, which was not covered by the terms of the special contract.

The Company appealed, and on the appeal case Justice Grove said—"It was not necessary to determine the question of 'wilful misconduct.' Mere honest forgetfulness could not, I think, be construed to be 'wilful misconduct.' The refusal to deliver was the result of the carelessness of the booking clerk in omitting to enter the words 'Carriage paid' on the consignment note, and I am not prepared to say whether such a state of facts would or would not amount to a case of wilful misconduct within the meaning of the condition. I prefer to rest my decision on the ground that the case does not come within the terms or conditions of the ticket. Does the word 'detention' cover the case of an actual refusal to deliver the cattle under what turned out to be an unfounded claim of right? I am of opinion it does not. I am inclined to think that such a state of things was never contemplated by the parties at the time of entering into the contract. The detention was not a casual or accidental detention in the course of delivery, but an intentional detention upon a supposed right of lien which they did not possess. The condition could not reasonably import an absolute right in the Company to detain goods as long as they pleased on any claim, however untenable it might be. I think the words, 'any loss, damage, or detention in the receiving, forwarding, or delivery,' must be read 'any loss, damage, or detention' during the course of 'the receiving, forwarding, or delivery.' It could not be said that the cattle were detained in the course of delivery, for they had arrived at the place to which they were to be carried."

Justice Lopes concurred, and said—"Upon the facts there

appears to have been a refusal by the Company's servants to deliver the cattle to the consignee at a time when the latter had an absolute right to them. The refusal to deliver was unjustifiable. It was competent to the Company to have at once made inquiry as to the payment of the carriage of the cattle. This they did not do, but kept the cattle; and this, I think, amounted to 'wilful misconduct.'" Judgment against Company.—*Tried in Court of Queen's Bench, November* 18, 1881.—*From Law Times Reports, vol.* 45, *page* 509.

CATTLE ESCAPING FROM TRUCKS IN TRANSIT, AND KILLED OR LOST.

Case No.

Chippendale v. *Lancashire and Yorkshire* (1851) 698
Three heifers escaped from a truck—Company held exempt from liability owing to special contract.

Gregory v. *West Midland Railway Company* (1864) 699
Cow fell or jumped out of a waggon—Waggon held not to be a suitable one—Company held liable in spite of a special contract.

Great Western v. *Blower* (1872) 700
Bullock, from inherent vice, jumped out of a waggon in transit, and was killed—Company held not liable.

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698. *Chippendale* v. *Lancashire and Yorkshire Railway Company.*—Action for £22 4s. for three heifers that got out of a cattle truck through a space between the close-boarding at the lower part of the side of the truck and a rail which ran round the top of the truck, whereby two heifers were killed and the third much injured—Wigan to Bury. There were thirteen beasts put into the truck, and a drover's pass was issued. Plaintiff signed the following risk note, and had a duplicate of it given him:—

"*N.B.*—This ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the Company will not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway or in their vehicles."

Plaintiff contended the Company were liable notwithstanding the special contract, as the truck was defectively constructed by reason of the space between the top rail of the truck and the close-boarding being too great. The County

Court Judge at Wigan held that, owing to the special contract, Plaintiff had no ground of action. Being urged by Plaintiff's counsel, he left it to the Jury to give an opinion whether the truck was unfit and unsafe, and if so, what damage Plaintiff sustained. The Jury considered the truck was defective, and that Plaintiff had suffered a damage of £21 4s. The Judge, however, directed a verdict to be entered for the Company. An appeal was taken to the Queen's Bench, when Justice Coleridge gave Judgment—"To take the risk note literally would certainly be to exempt the Company in all cases whatever against any risks of conveyance and against any injury or damage accruing to the animals while travelling. The Plaintiff had a full opportunity of knowing what the carriage was, for it is found that he saw one of the beasts put into it. Confining myself, therefore, to the circumstances of this case, and by no means laying down any general rule whatever, I am of opinion that the Plaintiff was not entitled to maintain this action, and that by the terms of the ticket it is to be understood that the Plaintiff took upon himself all risk whatever of damage to the animals during the journey, and that consequently the Company are fully protected." Justice Erle—"I think that the Plaintiff entered into a contract by which he undertook not to call upon the Company for any damage such as that which has accrued. I take it that the carriage was fit for the journey and fit for the weight, and that the damage has entirely arisen from the freight being living animals, who made all effort to escape, and so injured themselves. That seems to me to be a risk for which the Company peculiarly said that they would not be responsible. I think that a limitation, however wide in its terms, being in respect of live stock, is reasonable, for, though domestic animals might be carried safely, it would be almost impossible to carry wild ones without injury." Judgment for Company.—*Tried at the Court of Queen's Bench, Michaelmas Term*, 1851.—*Law Journal Reports, vol.* 21, *page* 22.

699. *Gregory* v. *West Midland Railway Company.*—Action for £30 for a cow that, during transit, fell or jumped out of a truck. The cow and a heifer were put in the same

truck, but not tied with halters — Abergavenny to Newport. The cow fell into or got into land adjacent to the railway, and the person owning the land had a claim against the Company. He killed the cow, and kept the carcase for his own use. The Plaintiff was not present when the cattle were loaded, and did not see the truck. The Plaintiff signed a cattle ticket with the usual conditions — (1) The Company were to be free from risk and any loss or damage in loading or unloading, &c., or injury in transit from any cause, &c., and the cattle were to be carried at owner's risk; (2) that the sender is required to see to the efficiency of the waggon before he allows his stock to be placed therein, and defects pointed out in writing before the train leaves the station; (3) the owner shall ride free in the waggon to take care of the stock, &c. The case was first tried before Justice Byles, at Monmouthshire Summer Assizes, 1863, when a verdict was given for Plaintiff, £30, with leave to the Company to appeal to reduce to £15 if Plaintiff should be entitled to the carcase of the cow only, *it being admitted that the truck was not a proper truck* for the purpose. Chief Baron Pollock said—"If the case of *M'Manus* v. *Lancashire and Yorkshire Railway Company* had been undisturbed by the Court of Error, I should have now thought the Company entitled to our Judgment; but that case has been distinctly overruled, and upon the very point which decides the present question." Baron Martin said—"I have a very strong opinion that the view I took of the Act which is contained in my Judgment in the House of Lords (*Peek* v. *North Staffordshire Railway Company*, 32 L.J.R., 258, Q.B.) is the correct one, but I yield to the House of Lords and act upon their Judgment. Looking upon this case and that of *M'Manus* together, it seems I am bound to give Judgment against the Company. It strikes me the real meaning of the second condition is, the Company intend—'In addition to any damage arising from the loading, we state we will not be liable for any misfortune arising from any defect in the waggon or the locomotive power;' and they put it upon the owner to examine the waggon. The first and third conditions together are framed in the strongest words the English language can express the Company's determination not to be liable—'We make no

charge for it; our charge is simply for the use of the waggon and locomotive power.' I cannot conceive how words can be used more strongly. The conditions do provide for the Company's non-responsibility throughout, which, in *M'Manus's Case*, is said to be an unreasonable thing to do, and the condition creating it is therefore void. It is, in point of fact, instead of leaving people to take care of themselves, attempting to take care of them by legislative enactment." Baron Bramwell concurred, saying—"The House of Lords decided a contract may be reviewed by a Judge, who is to say whether it is reasonable or not. I confess I cannot understand how anyone can say a general condition in reference to all mankind is reasonable, or how you can go into the question whether a bargain between two people is reasonable or not. However, for better or for worse, the matter is established. I think there can be no authority as a matter of law. Whether the particular contract is or is not just and reasonable must depend upon the circumstances of each particular case. I concur, owing to *M'Manus's Case*, we must hold the first condition to be neither just nor reasonable, although I own, as a matter of fact, that it is not void if the Plaintiff chose to agree to it." Baron Channell concurred. Judgment against Company.—*Tried in Court of Exchequer, January* 14 *and* 22, 1864.—*From Law Journal Reports, vol.* 33, *page* 155.

700. *Great Western Railway Company* v. *Blower.*—Action for value of a bullock, one of 33 cattle loaded in four waggons, Dingleston to Northampton. Near Oxford Road Station it was found the bullock had escaped out of the truck, and its carcase was found on the side of the railway a few miles down the line, where it had been killed by a train. The case was first tried in the Monmouthshire County Court, and a verdict given against the Company. The Company appealed, and on the appeal case Justice Willes said—"There was an accident without negligence. Did it result from the nature of the thing itself carried? The facts show that it did. It was found that the truck in which the animal was carried was in every respect proper and reasonably sufficient for the conveyance of the bullock. The cattle were loaded on to the trucks in the proper and usual way, and the doors were properly

closed and secured. The trucks were in every respect proper, and there was no actual negligence whatever. Merely suggesting that there might be a better truck is not sufficient to meet such findings. No carrier is obliged to have a new carriage for every journey. It is sufficient if he provides one which, without any extraordinary accident (such as this was), will probably perform the journey. The accident was caused by some inherent vice in the bullock." Justice Keating concurred. Judgment for Company, reversing the County Court decision.—*Tried in Court of Common Pleas, May* 30, 1872.—*From Law Journal Reports, vol.* 41, *page* 268.

Cattle Wrecked and Lost at Sea.

Case No.

Moore v. *Midland* (1875) 701

Railway company liable for negligence on sea part of journey, although they hire a steam packet company to carry that part of the journey.

Doolan v. *Midland* (1877) 702

Cattle lost in wreck of "St. Columba"—Risk note signed—Held to be an unreasonable condition.

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701. *Moore* v. *Midland Railway Company.*—Action for £611 10s. for loss of cattle wrecked in the "St. Columba" steamship on the Skerries Rocks, off Holyhead, June 21, 1873—Dublin to St. Ives. It was admitted that the loss of the ship arose from the negligence of the crew. One of the conditions of the carriage was—

"That the Company will not be accountable or responsible for loss of or any damage or injury to the cattle arising from any default or negligence of the master or any of the officers or crews of the Company's (City of Dublin Company) vessels."

Justice Morris said—"I agree entirely with my brother Lawson. It is quite clear that at the time of the passing of the 17 & 18 Vic., cap. 31 (the Railway and Canal Act of 1854), the Railway Company could have protected itself by such a condition as this, and so could a steam packet company. The 17 & 18 Vic., cap. 31, sec. 7, allowed railway companies to bind

themselves in conditions that were just and reasonable, but it left the law much the same as regards steam packet companies. However, it was soon found that the railway companies, who were fast becoming steam packet companies, were practically monopolies, for, if a man did not adopt their mode of transit, he would be left half-way, and could never arrive at the end of his journey. Railway companies were accordingly prohibited from creating a monopoly by the 31 & 32 Vic., cap. 119, sec. 16, which extended 17 & 18 Vic., cap. 31, to cases 'where a company is authorised to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working, steam vessels for the purpose of carrying on a communication,' &c. It was soon seen between the passing of the Act of 1868 (31 & 32 Vic., cap. 119) and the Act of 1871 (34 & 35 Vic., cap. 78, sec. 12)—an interval of about three years—that the former Act did not cover all the cases, for a railway company might practically carry out the same end by not building, buying, hiring, using, maintaining, or working, or entering into such arrangement, but by entering into an arrangement with a steam packet company, under which the steam packet company might work the vessel. Accordingly the Act of 1871 (34 & 35 Vic., cap. 78, sec. 12) may be interpreted as saying—'Railway companies, if you enter into any through-booking arrangement, and make any agreement whatsoever with a steam packet company, you will be just as liable for the cattle, goods, and property as if the accident took place on your own vessel.'" Justices Lawson and Keogh concurred. Judgment against the Company.—*Tried in Court of Common Pleas, (Ireland), Jan.* 12 *and* 13, 1875.—*From Irish Reports, Common Law Series, vol.* 9, *page* 20.

702. *Doolan* v. *Midland Railway Company.*—Action for £765 for 63 cattle lost in the "St. Columba," which was wrecked on the Skerries Rocks, near Holyhead. The Plaintiff, a cattle dealer in the county of Carlow, made a through contract with the Company, subject to the usual conditions of owner's risk, to carry between Dublin and St. Ives. The case was first tried at the Kildare Summer Assizes, 1874, before Chief Baron Palles, when the Jury found that the loss

was occasioned by the negligence of the crew of the "St. Columba," and gave Plaintiff a verdict for £765. The Company obtained a rule to enter a non-suit or a verdict for them on the ground that they were exempted from liability for negligence by the condition in the risk note. The Court of Common Pleas discharged the rule on the ground that the condition was rendered void by the Railway Regulation Acts. The Company then appealed to the Exchequer Chamber, where the decision of the Common Pleas was reversed by Judges Palles, Fitzgerald, Deasy, and Dowse, the three other Judges dissenting. This appeal was then brought to the House of Lords *(Irish Reports*, 10 C.L., 47*)*. The arguments of counsel turned upon the construction of the sections of the Railway Acts of 1854, 1868, and 1871.

Lord Blackburn, July 27, 1877, gave Judgment—"The Company, having no special powers for building or working steam vessels, made the contract of carriage in Dublin, and procured the City of Dublin Steam Packet Company to carry the cattle to Liverpool. The Jury found the cattle were lost by negligence of the crew, and not by any peril of the sea. The special contract of carriage includes the words 'improper, careless, or unskilful navigation, or any default or negligence of the master or any of the officers or crews of the Company's vessels.' If, therefore, the condition is valid, it protects the Company from liability for the loss which happened. The issue is wrapped up in the contention whether or not the contract is rendered void by the 12th section of the Regulation of Railways Act, 1871 (34 & 35 Vic., cap. 78, sec. 12). The construction of this section is not a simple matter. The Court of Common Pleas in Ireland, in *Moore* v. *Midland Railway Company* (Irish Reports, 9 C.L., 20), and the Court of Exchequer and Court of Appeal in England, in *Cohen* v. *South Eastern Railway Company*, have unanimously held that the whole of the Railway and Canal Traffic Act, 1854 (17 & 18 Vic., cap. 31), is extended to the whole of the traffic on such steamboats as a railway company own or work. The Act of 1871, by section 1, is to be construed as one with the Act of 1868 (31 & 32 Vic., cap. 119); while the 16th section of this Act (1868) extends the provisions of the Railway and Canal Traffic Act 'to steam vessels and the

traffic carried on thereby.' The case of *Peek* v. *North Staffordshire Railway Company* (27 L.J., Q.B., 465), by the decision of this House, settles 'that a condition having the effect of exempting the carrier from responsibility for the *negligence* or fraud of his own servants is not just and reasonable within section 7 of the Railway and Canal Traffic Act, 1854.' In the present case the Midland Company did not own or work the steam vessel. They were not, therefore, brought within the provisions of the 16th section of the Act of 1868. They, however, did contract to carry the cattle, and procured them to be carried in a steam vessel not their own. By the Railway Clauses Consolidation Act of 1863 (26 & 27 Vic., cap. 92), section 31 expressly extends the provisions of the Act of 1854 'to steam vessels and the traffic carried thereby.' The railway interest sought to take advantage of the tendency of the Railway Regulation Bill of 1871 to introduce an enactment making their liability when they were procuring other shipowners to carry for them no greater than if they were carrying in their own ship, the burden of proof that the misfortune happened while the goods were on the ship being on the company. This called attention to the fact that the Act of 1868 left a railway company at liberty to impose any conditions when they procured other shipowners to carry for them. It was thought the restrictions placed on companies when carrying in their *own* vessels should be extended, and be made the same as when carrying in vessels not their own. Again, if a railway company had contracted to carry partly by rail and partly by sea, and partly by coach or other conveyance, on which they might by contract impose any condition, the burden of proof that the misfortune happened after the goods had passed out of the steamship ought to be on the railway company. It is the unfortunate attempt to make one clause instead of two serve for two purposes that has created the obscurity. The only remaining question is whether the condition of the risk note is to be adjudged 'reasonable' within section 7 of the Railway and Canal Traffic Act, 1854. This condition tries to exempt the Company from all liability for the negligence of their *employés*. Now, if any condition can be *unreasonable* within the decision of *Peek* v. *North Staffordshire Railway*

Company, this is. I therefore advise your Lordships to reverse the Judgment and allow the appeal, with costs." The Lord Chancellor (Cairns) and Lords O'Hagan and Gordon concurred. Judgment for Plaintiff.—*Tried in the House of Lords, July* 12, 13, 17, *and* 27, 1877.—*From Appeal Cases, House of Lords, vol.* 2, *page* 792.

CATTLE KILLED OR INJURED IN TRANSIT.

Case No.

Byrne v. *Chester and Holyhead* (1855) 703
Two cows died in transit—Company held not liable under special contract.

Pardington v. *South Wales* (1856) 704
Cattle smothered in a van from the lid falling down—Company held protected by their special contract note.

Price v. *North L. S. N. Co.* (1864) 705
Cow killed on steamer by blow from rope's-end—Company held not liable.

Rain v. *Glasgow and South Western* (1869) 706
Two cattle trodden to death from overcrowding—Company held not liable.

Irvine v. *Dundalk and Newry Steam Packet Co.* (1875) ... 707
Company held not liable for a bullock smothered on sea voyage.

Harris v. *Midland* 708
When special contract exempts all liability except negligence, Plaintiff to prove negligence.

Corrigan v. *Manchester Sheffield and Lincolnshire* (1879) ... 709
Any condition imported into a contract of carriage at Company's risk may invalidate sender's fair option of two rates, and render the owner's risk rate inoperative to protect the carrier.

M'Nally v. *Lancashire and Yorkshire* (1880) 710
Two cows suffocated on the sea portion of the journey, Liverpool to Manchester.

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703. *Byrne* v. *Chester and Holyhead Railway Company.*—Action for £25 7s. for death of two cows and injury to eight others, Dublin to Warrington. Plaintiff proved delivery to Company at Dublin on 15th July; the next day the cattle were loaded at Holyhead by Plaintiff, who travelled on a free pass with the cattle. The cattle were not unloaded at Warrington till after midnight on the 16th July, when one cow was dead;

and another died shortly after. The ten cows consisted of five that had recently calved, and the five others were "springers," or cows shortly about to calve. Plaintiff was cautioned at Holyhead that it was unsafe to load so many cows in one waggon. It was customary to issue the tickets at Holyhead. The charge being per waggon-load and not per head, it could not be ascertained until the stock was loaded the amount of carriage. The Company pleaded the special contract at back of cattle ticket. Plaintiff had the cattle ticket placed in his hand, but he refused to admit this document had been given him at Holyhead, but said he received a paper something like it; one of his witnesses admitted he always received at Holyhead similar tickets. The Judge told the Jury if they believed Plaintiff had received the ticket as stated, and held custody of it till he arrived in Warrington, and if they considered he had had reasonable opportunity of reading the contents, they must assume his cognisance without more direct proof. Verdict for Company.—*Tried in Court of Exchequer, Dublin, before Baron Green and a Common Jury, December* 4 *and* 5, 1854.

The Plaintiff made an application before three Barons of the Exchequer, and it was ruled the Judge had misdirected the Jury, and a new trial was granted.

Plaintiff now contended the Company quoted £3 10s. for the carriage of the ten cows, and that payment had been tendered in Dublin. The Company denied this, and contended Plaintiff was told he might send the ten cows, and that the rate would be £3 10s. *per waggon*, and no question was asked as to how many would go into a waggon. The Chief Baron charged the Jury, and left to them the following points—(1) Was the contract in Dublin to convey ten cattle, or cattle at £3 10s. per waggon-load? (2) Was a new contract, limiting the liability of the Company according to the indorsement on the cattle ticket, assented to by Plaintiff at Holyhead? (3) Was the injury to the cattle occasioned by the neglect or default of the Defendants or their servants? (4) Was the injury occasioned by the overcrowding by Plaintiff of the cattle in the waggon? The verdict was in favour of the Company on every point. Exceptions were taken by Plaintiff's counsel, and notice given that the case would be brought before

the twelve Judges of Ireland for reconsideration.—*Tried before the Chief Baron, in Dublin, June*, 1855.—*From Irish Jurist, vol.* 1, *N.S., page* 174.

704. *Pardington* v. *South Wales Railway Company.*—Action for £135 for death of ten cattle loaded in a salt van. The pin of the lid of van did not prevent the lid closing down, which led to the cattle being smothered—Newport to Gloucester. Plaintiff's agent, Morgan, signed a note with the following condition :—

"The Company is to be held free from all risk or responsibility in respect of any loss or damage arising in the loading or unloading, from suffocation, or from being trampled upon, bruised, or otherwise injured in transit, from fire, or from any other cause whatsoever."

A drover's pass was issued, but the man travelled in the guard's van. The Company contended this special agreement relieved them from liability. The case was first tried at the Gloucester Summer Assizes, before Baron Alderson, who held that the special contract protected the Company, but gave Plaintiff leave to appeal. On the appeal case Plaintiff contended there was evidence of negligence; that the truck was of an improper description, and, even if fit for the purpose, it was only by having the van lid kept properly open; that the 7th section of the Railway and Canal Act, 17 & 18 Vic., cap. 31, laid down the conditions that the contract must be reasonable, as follows :—

"Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to receiving, forwarding, and delivering of any of the said animals, articles, goods, or things as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be just and reasonable: provided always that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for

carriage: provided also that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said Act, 11 Geo. IV. and 1 Will. IV., cap. 68, with respect to articles of the description mentioned in the said Act."

Chief Baron Pollock said—"I am of opinion there ought to be no rule for Plaintiff. It appears to me quite reasonable that such a stipulation should be made as was made in the present case. Accommodation is provided by the Company for the cattle which are to be carried; the drovers are permitted to go with them, and they have full opportunity of knowing whether the accommodation provided is sufficient or not. The Plaintiff had been expressly told beforehand what the terms were upon which the cattle were to be received and carried, and he has no right now to say those terms are unreasonable. Why should the Company not say, seeing that the common law liability does not apply to cattle, 'If you insist upon our carrying your cattle, we will carry them, but it must be upon the terms that we shall not be responsible for any injury which may happen to them'? They only hold themselves out as carriers of horses and cattle *sub modo*." Barons Martin, Bramwell, and Alderson concurred, and considered the contract just and reasonable; and the latter said—"I think the negligence was really that of Plaintiff's servant, and that the Company are not liable on that ground, for he never took the trouble from the beginning to the end of the journey to look at the cattle to see whether they were right." Judgment for Company.—*Tried in Court of Exchequer, November* 5, 1856.—*From Law Journal Reports, vol.* 26, *page* 105.

705. *Price* v. *North Lancashire S. N. Company.*—Action for value of a cow, one of five, Belfast to Fleetwood. Plaintiff pleaded that at Fleetwood one of Company's men struck the cow a severe blow with a rope's-end, which knocked her down, and she had to be slung on to quay by ropes, and soon after died. Company pleaded special contract at lower rate, signed by Plaintiff, who, although he did not read contract note at the time, the Judge said he must have known its contents. The Company, by contract, were to be exempted from liability for any act, neglect, or default of their men or officers. The Company alleged the cow, in stepping to hatchway, slipped and fell; that she was struck to raise her, but she was

unable to rise. Plaintiff's man, who got a free pass to look to the cattle, was on the pier head instead of looking after his cattle. Judge held the Company, as common carriers, could limit their responsibility by special contract, and no negligence had been proved. Verdict for Company.—*Tried before Judge Hayes, on appeal, at Belfast, Aug.* 5, 1864, *and decision of Chairman of County Antrim reversed.—From Irish Clearing House Reports, No.* 36, *page* 59.

706. *Rain* v. *Glasgow and South Western Railway Company.*—Action for value of two Galloway cattle that fell in a waggon with eleven other cattle, and were trampled to death—Bridge of Dee to Norwich. Plaintiff personally called at the station and bespoke a truck of specified dimensions (15 feet). He and his man next day (12th March, 1867) loaded the cattle in a 15-feet truck, and sent them off without any drover, who would have been allowed to travel free. He signed the Company's special contract, accepting all risk. The case was twice tried, before Sheriff Substitute and before the Sheriff, who gave a verdict for Plaintiff, holding that the onus was on the Company to prove that they had not been guilty of negligence. An appeal was taken to the Court of Session, when the following decision was given :—"The Lords find that the injury to the cattle arose from the fault of the Plaintiff in putting thirteen cattle into a truck not sufficiently large to contain and carry them safely on so long a journey. Find there is no evidence of any negligence or fault on the part of the Railway Company or their servants. Find the Company, in point of law, are not responsible for the loss." Judgment for Company.—*Tried before Lords Deas and Kinloch, Court of Session, Edinburgh, January* 29, 1869.—*From Clearing House Reports, No.* 206, *page* 248.

707. *Irvine* v. *Dundalk and Newry Steam Packet Company.*—Action for £18 15s. for a bullock smothered in a lot of seven on voyage, Newry to Ardrossan. Plaintiff pleaded that the special contract signed only referred to the neglect of officers and men engaged in the navigation of vessel, and that the neglect of the bullock man, who stowed the cattle in the hold, was not specified or included in the special contract. He admitted the Company had power to bind persons by

conditions, however unreasonable. The case was first tried before the Chairman of Quarter Sessions, who gave a verdict for Plaintiff, and this was the appeal. Judge reversed the decree of Court below, considering the special contract relieved Company of responsibility.—*Tried before Chief Baron Palles, Armagh Assizes, 2nd March*, 1875.

708. *Harris* v. *Midland Railway Company.*—Action for value of a cow found dead in the truck at Bedford, and which must have been killed between Market Harborough and Bedford. The Plaintiff's son, who shipped the cattle, signed the following note:—

"I have received the counterpart of this ticket, and agree to abide by the conditions expressed on the back thereof, in consideration of the Company's charging me as above, being less than they are by statute entitled to charge. Signed ——. In presence of ——."

On the back was as follows:—

"The Company will not be responsible for any loss or injury to any horse, cattle, or other animal, in the receiving, loading, forwarding, unloading, or delivery thereof, if such damage be occasioned by being trampled on, or by the kicking, plunging, or unruliness of the same or of any other animal forwarded therewith; nor for any injury or damage occurring to the same whilst travelling, or in loading or unloading, unless such damage or injury shall be caused by negligence on the part of the Company or their servants."

The cow, when skinned, was discovered to have its spine greatly injured and the shoulder bone broken.

Baron Cleasby said—"I am of opinion the Judgment must be for the Company. The onus of proof is on the Plaintiff. The Company engage to carry safely, but to be liable only for negligence. There was no evidence of negligence here, only conjecture. The injury must have been received during transit, but there is not sufficient evidence to show how it was inflicted. The Plaintiff must show that death was caused by what he alleges. The fact of its being found in the condition alleged upon its arrival cannot be sufficient to show that such a state of things was brought about by negligence of the Company. The other question is—Are the conditions reasonable under section 7 of the Railway and Canal Act? The clause here is that the Company are not to be responsible for anything unless caused by negligence. I think this is a reasonable

condition in every respect, and that the Company may protect themselves by two tariffs, which they seem to have done here." Justice Grove concurred. Judgment for Company.—*Tried in Appeal Court, Nov.* 9, 1876.—*From Weekly Reporter, vol.* 25, *page* 63.

709. *Corrigan* v. *Manchester Sheffield and Lincolnshire Railway Company.*—Action for cattle killed and injured on sea journey, and through-booked Dublin to Huntingdon and Dublin to March. The sender had an option of Company's rate and owner's rate, and he selected the owner's risk rate. Attached to the owner's risk rate was a condition—

"The Company will not be responsible for loss arising in any way from the overcrowding of such waggons, or for injuries done in the loading or unloading in consequence of one animal injuring another."

Baron Fitzgerald said—"The substantial question which we have to decide is whether the condition annexed to the alternative undertaking offered by the Company is just and reasonable within the meaning of the statute 17 & 18 Vic., cap. 31, sec. 7. If, therefore, the special contract actually signed by the Plaintiffs can be supported as binding them, it can be so only by reason of the alternative contract offered being held 'just and reasonable,' and, as I think, just and reasonable as a whole, and not just and reasonable only as respects its condition relating to the sea part of the transit. The contrary was hardly argued before us, and it seems to have been in effect so decided in the case of *Lloyd* v. *Waterford and Limerick Railway* (15 Irish Common Law Reports, 37). The alternative here offered to the Plaintiffs was not the common law liability in respect of default or neglect, but only *another special contract* with conditions limiting such common law liability." Judgment against the Company.—*Tried in Court of Exchequer (Ireland), Nov.* 21 *and Dec.* 8, 1879.—*From Law Reports (Ireland), vol.* 6, *page* 90.

(*Opinion of Samuel Walker, Q.C.*—The decision in *Corrigan's Case* leaves untouched the principle on which the contract in that case was framed, viz., that by the offer of an alternative rate the railway company may limit its responsibility in the case where the reduced rate is charged. *Corrigan's Case,*

however, establishes that the only safe way in the case when the full rate is charged and accepted is to leave the liability of the carrier in such cases free altogether from condition or contract, as to land as well as sea, and let the law measure the liability.)

710. *M'Nally* v. *Lancashire and Yorkshire Railway Company.*—Action for loss of two fat cattle, suffocated on the voyage from Dublin to Liverpool, *en route* for Manchester, and for injury to 58 other fat cattle, part of same consignment. The cattle were carried at owner's risk. The Plaintiff contended that the City of Dublin Company, who carried the cattle from Dublin to Liverpool, had been guilty of misconduct and default in omitting, "wilfully and wrongfully," to set the wind sail communicating with the part of the steamer in which the cattle were carried. They were also charged with unreasonable delay in unshipping the cattle at Liverpool, resulting in injury to them and deterioration of their value. Plaintiff contended that the contract at owner's risk which he had signed was bad, inasmuch as he had not a reasonable alternative, as one of the conditions of the Company when the cattle were carried at the Company's risk was as follows:—

"That the Company will not be accountable for the correct selection of each owner's stock on landing, nor on loading into the waggons at Liverpool Station, nor on unloading at destination."

On the appeal case Lord Chancellor O'Hagan said—"It may now be taken as settled that a contract tendered to a person having property to be conveyed which is *primâ facie* neither just or reasonable may become so if he is at the same time offered the opportunity of entering into one which is just and reasonable—does not agree to convey the cattle under the ordinary carrier's liability, but under that liability subject to certain specified conditions, of which one of the most important is that on which controversy in the case occurs. I agree with the Chief Baron that if any of these conditions be unreasonable, the alternatives offered must be unreasonable; whilst if all of them be just and reasonable, that alternative must be also just and reasonable, although it may modify or limit the ordinary liability of the carrier. The Company have control of the

steamer, of the waggons, of the arrangements for unloading. The person whose goods are committed to them is at the mercy of their servants, over whom they exercise their control; and yet, if this condition be taken—as I think it ought to be taken—in its literal sense, he has absolutely no remedy, whatever may be their neglect or their malversation in mixing up the cattle of the various dealers, and doing, it may be, a great and irreparable wrong." It was thus held that because the carrier, when professing to carry under his common law liability, attached a special condition to that, then the Plaintiff, in selecting one of the two conditions of carriage, had not a just and reasonable alternative afforded him; hence the contract was vitiated. Thus the conclusion from the decision is that no conditions whatever can be attached when the traffic is carried at the Company's risk, except such as a Judge may hold to be just and reasonable, in accordance with the ordinary liability at common law of a common carrier. Judgment against the Company.—*Tried in the Court of Appeal (Ireland), Nov.* 10 *and* 11 *and Dec.* 15, 1880.—*From Law Reports, vol.* 8, *page* 81.

Cattle Killed on Railway Crossings and Stations.

Case No.

Sharrod v. *London and North Western* (1849) 711

Sheep killed on line—Value not recoverable on an action for trespass.

Ricketts v. *East and West India Docks* (1852) 712

Twelve sheep killed on railway—Strayed from a close beyond the adjoining close—Company held not liable.

Manchester Sheffield and Lincolnshire v. *Wallis* (1854) 713

Two horses straying passed through an open gate of station yard on to the line, and were killed—Company held not liable, as horses were not lawfully using public road.

Ellis v. *London and South Western* (1857)... 714

Cattle killed on line—Occupation roadway—Plaintiff did not keep the gate locked—Company held not liable.

Roberts v. *Great Western* (1858)... 715

Bull, after being unloaded, strayed on to railway and was killed —Company held not liable to keep up any fence from loading bank to roadway.

Case No.

Fennell v. *Waterford and Limerick* (1874)... 716

Cattle killed on line—No evidence as to who opened the crossing gate.

Sneesby v. *Lancashire and Yorkshire* (1874) 717

Cattle passing over a level crossing frightened by shunting of waggons near—Cattle escaped from drovers, got on to another part of the line through a garden fence, and were killed—Company held not liable.

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711. *Sharrod* v. *London and North Western Railway Company.*—Action for seven sheep that had strayed on the line and been killed by a train driven at the rate of forty miles an hour. It was alleged there was insufficiency of the Company's fence. The action was raised in the form of trespass—that the Company's engine, being driven on a public highway at unreasonable speed, had trespassed upon the sheep and killed them. The case was first tried at the Stafford Summer Assizes, 1848, before Baron Rolfe, when a verdict was given against the Company for £10, leave being given to move to enter a non-suit on the objection that the action, if maintainable at all, should have been *in case* and not *in trespass.* On the appeal Baron Parke said—"The law is well established on the one hand that whenever the injury done to the Plaintiff results from the immediate force of the Defendant himself, whether intentionally or not, the Plaintiff may bring an action of trespass; on the other hand, that if the act be that of the servant, and be negligent, not wilful, *case* is the only remedy against the master. Our opinion is that in all cases where a master gives the direction and control over a carriage or animal or chattel to another rational agent, the master is only responsible in an action on *the case* for want of skill or care of the agent. If the Plaintiff's cattle had a right to be on the railway, the Plaintiff has a remedy by an action on *the case* against the Company for causing the engine to be driven in such a way as to injure that right; for the Company were bound to see that their carriages did not travel at such a speed as to make it impossible to avoid other persons who had a lawful right to be there. If the cattle were wrongdoers, there has been no neglect or misconduct for which the Defendants are

responsible. If the cattle had an excuse for being there, as if they had escaped through defect of fences which the Company should have kept up, the cattle were not wrongdoers, though they had no right to be there, and their damage is a consequent damage from the wrong of the Company in letting their fences be incomplete or out of repair, and may be recovered accordingly in an action on *the case*." Barons Alderson, Rolfe, and Platt concurred. Judgment for Company.—*Tried in Court of Exchequer, December* 10, 1849.—*Law Journal Reports, vol.* 20, *page* 185; *also reported in Railway and Canal Cases, vol.* 6, *page* 239.

712. *Ricketts* v. *East and West India Docks and Birmingham Junction Railway.*—Action for the value of twelve sheep that strayed on to the railway and were killed. It appeared the sheep were in pasture beyond the railway, that they strayed through Plaintiff's defective fence into a close belonging to the Great Northern Railway Company, and across this close and through a defective fence on to the railway. Plaintiff was not a licensee or temporary occupier of the Great Northern Company's close. The Company contended that by the 68th section of the Railway Clauses Consolidation Act they were only required to fence in favour of the land occupied by the Great Northern Company, and were not required to fence against the whole world; that they were only bound to maintain the fence as against the Great Northern Company. Chief Justice Jervis said—"I am of opinion the Company are entitled to the Judgment of the Court. It was not suggested the sheep were killed wilfully, or by negligent driving of engine. Although the owners of the close adjoining the railway would be entitled to maintain an action for an injury done to *their* cattle straying from *their* close, the Plaintiff would not be entitled to do so. The general rule of the law is—'I am bound to take care that my beasts do not trespass on the land of my neighbour, and he is only bound to take care that his cattle do not wander from his land and trespass on mine.' Had the Plaintiff any right to have his sheep on the close adjoining the railway? It is admitted they were there by a breach of duty of Plaintiff himself. The Company are liable for the non-repair of

the fences only as against the proprietors of the adjoining close. It seems to me the Railway Act has very properly taken the rule of the law as to the measure of liability to be incurred by railway companies. It is said this decision may conflict with *Fawcett* v. *York and North Midland Railway Company.* But this is not so. Fawcett recovered, not on the common law, but on an Act of Parliament imposing upon the Company the duty of closing the gates under all circumstances. When the act is that of a servant in performing his duty to his master, the rule of law we consider to be that *case* is the only remedy against the master, and then only is maintainable when the act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant, a rational agent. The agent's direct act or trespass is not the direct act of the master. Each blow of the whip, whether skilful and careful or not, is not the blow of the master; it is the voluntary act of the servant. Nor can it, we think, be reasonably said that all the acts done in the skilful and careful conduct of the carriage are those of the master, for which he is responsible in an action for trespass to the same extent as if he had given them himself, because he has impliedly ordered them, and those that were careless and unskilful were not, for he has given no order except to use skill and care." Justices Cresswell, Williams, and Talfourd concurred.—*Tried in Court of Common Pleas, April* 28, 1852.—*Law Journal Reports, vol.* 21, *page* 201.

713. *Manchester Sheffield and Lincolnshire Railway Company* v. *Wallis.*—Action for £35, value of two horses killed on the line at Torksey Station. The horses were in a close near the station, and through the close two public roads passed. At each end of the close were gates across the road. It is supposed some person using the road left the gate open. The horses, however, strayed on to the public highway, and coming to the station gate, which was propped open, although closing with a spring, the horses strayed into the station yard. A porter, about 6 p.m., turned them out; but some time afterwards they strayed in again, and when the gate was closed for the night they were accidentally fastened in. They got on to the

line, and were killed by a goods train. The case was first tried at the Leicester County Court, and a verdict given by the Jury for Plaintiff for £35. The Company appealed, and on the appeal case Chief Justice Jervis gave Judgment. He said—"We must assume the cattle, without any fault of Plaintiff's, strayed on to the public highway. Whilst cattle are passing along a highway the owners of such cattle are using it according to the dedication of the owner of the soil, and, being there with his consent, the cattle owners are strictly (legally) occupying the highway. If cattle thus, whilst passing along a highway, stray into an adjoining field, the owner of that field cannot distrain them for damage if he was bound to keep up the fence against the road. We are of opinion the Plaintiff was not *occupying* (legally) the road with his cattle which strayed on the road, and therefore there was no obligation upon the Company to maintain a fence against them." Judgment for Company.—*Tried in Court of Common Pleas, Jan.* 23, 1854.—*From Law Journal Reports, vol.* 23, *page* 85.

714. *Ellis* v. *London and South Western Railway Company.*—Action for cattle killed by straying on to the line through an occupation gate. The railway cuts through Plaintiff's land, and the Company provided an accommodation way crossing the railway on a level. The way was closed on the two sides by gates, with padlock and key. The key had been given to Plaintiff, but had been lost, and one of the gates was fastened by a piece of stick in the mortice. It did not appear, when Plaintiff's boy had driven the cattle home on the evening in question, whether he had fastened the gate or not. That evening the cattle strayed on the line and were killed, and the engine was thrown off the line and considerable damage done. Plaintiff contended there was an old footway across the field and over the railway. The Judge considered this did not affect the question. The Judge left it to the Jury whether the accident arose through any negligence of the Company, or partly by reason of neglect on the part of the Plaintiff. The Jury found for the Company. This trial took place at the Hertfordshire Lent Assizes, before Justice Cresswell.

Plaintiff appealed. The 75th section of the statute (8 & 9 Vic., cap. 20) requires, under a penalty—

"That any person shall shut and fasten any gate set up at either side of the railway for the accommodation of the owners or occupiers of the adjoining lands, as soon as he or the cattle under his care shall have passed through the same."

The Company, on the new trial, contended it was the Plaintiff's fault that the cattle were able to get out of the field and stray, and the Company were not liable for the consequences. The case of *Fawcett* v. *York and North Midland* was on a statute (5 & 6 Vic., cap. 55, sec. 9) now repealed, and which imposed on the Company the duty of keeping the gates closed. Chief Baron Pollock said he considered the Judge's direction was correct, and it was right to put to the Jury whether Plaintiff, by negligence of his own, had contributed to the accident. Foot passengers would have no right to break down or break open a gate erected under an Act of Parliament. Barons Martin, Bramwell, and Watson concurred. Judgment for Company.—*Tried in the Court of Exchequer, November* 28, 1857.—*From Law Journal Reports, vol.* 26, *page* 349.

715. *Roberts* v. *Great Western Railway Company.*—Action for the value of a bull that, after having been unloaded from a waggon, strayed and was killed on the line. In going from the unloading bank cattle had to pass through a yard on to the highway. While the bull was lawfully in the said yard on his way from the station (unloading place) to the common highway, he strayed from the yard into and upon the railway. Plaintiff contended the Company were bound to maintain good and sufficient fences between the railway and the yard. Justice Crowder said—"This declaration is insufficient. It is alleged that the Company are the owners and occupiers of a railway and yard, through which cattle going by the railway are used to pass in going from the railway to the highway; and there is a further averment that the Company, by reason of the premises, ought to have made and maintained good and sufficient fences. I see no ground at all for holding the Company liable, for there has been no argument—no reference to any case—to show that there was any legal liability to maintain a good and sufficient fence between the railway and the yard.

This is a case of not taking proper means to prevent the cattle from straying, and if there were such a duty, an action would lie. But the declaration rests on this—that the Defendants were bound to maintain fences, and they clearly were not; and as the loss is said to arise from that want of fences, the Company are not liable."

Justice Willes—"I am of the same opinion. It is quite consistent with this declaration that the animal was allowed to remain in the yard till it suited the owner to take it on, and that it was not in the charge of the Company at all. It may be a question whether, in respect of carrying on a dangerous trade, the Company would be liable; but I say nothing as to that, the declaration being consistent with a state of facts on which no action could be possibly maintained." Judgment for Company.—*Tried at Court of Common Pleas, June* 25, 1858.—*Law Journal Reports, vol.* 27, *page* 266, *C.P.*

716. *Fennell* v. *Waterford and Limerick Railway Company.*—Action for £98 for eight bullocks that strayed on line through a private gate and were killed. Plaintiff rented land from Mr. Harvey. Mr. Harvey's servant boy had driven an ass and cart through the gate and over the railway. He unlocked the gate, but did not re-lock it. When he returned in an hour, he found the cattle killed. Plaintiff pleaded the gate was out of order—that the bolt shot into a loose socket, and that, upon striking it a good many times, the bolt kicked back and the gate opened, and by reason of this defect the cattle were killed. Company pleaded there was no evidence as to how the gate got open; that the gate was not defective; that, if it were, there was no evidence such defect caused the bullocks to get on line; that it was probable some person using the path during the hour the boy was away opened and neglected to close the gate. The Chief Baron non-suited Plaintiff, giving leave for appeal.—*Tried before Chief Baron, Clonmel Spring Assizes*, 1874.

Plaintiff appealed to *Court of Exchequer, Dublin, 13th November*, 1874, before a full Court. Judgment for Company, on the ground that there was no evidence to connect the cattle being on the line with any defect in the gate, and it was just as probable a passer-by opened and omitted to shut it.—*From Irish Clearing House Reports, No.* 65, *page* 131.

717. *Sneesby* v. *Lancashire and Yorkshire Railway Company.*—Action for value of seven cattle (£153 13s.) that escaped from the control of their drovers at a level crossing. 29 fat beasts for Wakefield market were being driven over a level crossing near Wakefield at 11 p.m. Near the crossing were several sidings, and while the cattle were passing over the crossing a number of trucks were negligently shunted so as to frighten the cattle and cause seven of them to escape from the control of the drovers. It appeared the seven cattle got into a garden and orchard in the occupation of a tenant of the Company. The garden adjoined a branch line of the Company, and the garden fence was not sufficient to keep the cattle from getting on to the line, where they were killed. The case was first tried at the Leeds Spring Assizes, 1873, before Chief Justice Bovill, who directed a non-suit, with leave for Plaintiff to move to enter a verdict for the amount, the Court to draw inferences of fact.

On the appeal case Justice Blackburn said—"I am of opinion the Company are liable. The well-known rule as to the liability for damage is *Causa proxima non remota spectatur*, and Lord Bacon says—'It were infinite for the law to consider the causes of action and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of facts by that, without looking to any further degree' (*Bac. Max. Reg.*, 1). I think it clear that when the cattle got off and escaped from the control, without the fault of the Plaintiff, that whatever reasonably resulted from their being unprotected was the *causa proxima* of the escape. I think the accident which subsequently befell them was the natural result of their being deprived of control, and the Company must be held to be responsible." Justices Quain and Archibald concurred. Judgment against Company.—*Tried in Court of Queen's Bench, February* 3, 1874.—*From Law Journal Reports, vol.* 43, *page* 69.

CATTLE CASES—MISCELLANEOUS.

Case No.

Slim v. *Great Northern* (1854) 718
What constitutes delivery of cattle to carrier.

Malcolmson v. *Irish South Eastern* (1859) 719
Cattle sick with infectious disease—Carrier can refuse to carry.

Willis v. *Great Western* (1865) 720
Delay to cattle—Plaintiff was allowed to state a conversation he had a week after the delay with the Company's servant, who admitted he forgot to send the cattle on—Held, the Company's servant has no implied authority to bind the Company by such admission.

Prenty v. *Midland* (1866) 721
Company held *not* to have a lien on an entire consignment of pigs for an undercharge due upon three pigs over half the waggon-load.

Malpas v. *London and South Western* (1866) 722
Goods clerk quoting through charge for cattle, Guildford to King's Cross, it was held that the Company accepted an additional contract, Nine Elms to King's Cross, although the consignment note was only made to Nine Elms, the Company's terminus.

Shepherd v. *Bristol and Exeter* (1868) 723
After cattle had been penned in Company's pen, two died—Company held not liable.

Cox v. *Great Eastern* (1869) 724
A railway company has no power to make a charge of 1s. per truck for cleaning or whitewashing waggons.

M'Court v. *London and North Western* (1869)... 725
Action against an intermediate company who did not make the contract with sender.

Allen v. *Lancashire and Yorkshire* (1870) 726
Cow exchanged on journey.

Brady v. *City of Dublin Steam Packet Company* (1871) ... 727
Pig lost—Plaintiff in charge.

Gill v. *Manchester Sheffield and Lincolnshire* (1873) 728
Cow escaped off cattle platform on to line after unloading, and was killed—Company held liable.

Shaw v. *Great Southern and Western* (1881) 729
Pigs injured by whitewash which came off the sides of the cattle pens at Maryborough Station.

718. *Slim* v. *Great Northern Railway Company.*—Action for the loss of six pigs at Hitchin Station. Plaintiff had delivered and trucked 203 pigs; he then bought six more pigs in the town, and sent them to the station by another dealer named Lewis, who was taking some of his own pigs to the station. Lewis was to give the pigs to the cattle porter, Morgan; he told Morgan about them, and Morgan said he would put them with Plaintiff's other pigs. The pigs, however, were lost. The course of business was—On delivery of the pigs a loading note was made out by the Company's porter, countersigned by the sender, and then the sender took this note into the office, and, on paying the carriage, exchanged it for a cattle ticket, which ticket was an order for delivery of the pigs at the point of destination. The case was first tried at the London Sittings, Trinity Term, before Justice Williams, who left it to the Jury to say whether Morgan had received the pigs. The Jury found he had, and a verdict was given for Plaintiff. The Company appealed, and on the appeal case Chief Justice Jervis said—"I am of opinion the Plaintiff cannot recover. In the usual course of business he received, on the delivery of the 203 pigs, a paper which gave him notice that the Company would not be responsible unless the pigs were signed for as received by their clerks or agents. In this state of things he sent these pigs to the station by Lewis, who did not profess to be a servant of his, with whom Morgan might enter into a contract other than the usual one." Justice Maule said—"Morgan tells Lewis to take care of his own pigs, and he (Morgan) will take care of the others, meaning that he would take care of them if the Plaintiff, or somebody else for him, should do what was requisite, according to the ordinary course, when the Company would be responsible for the pigs. I do not think that what Morgan said or did amounted to making a contract, or that he took upon himself to make any such contract." Justice Cresswell—"I am of the same opinion, both on the ground that there was no evidence of any authority to Morgan to bind the Company without the usual documents, and also that it did not apppear that he held himself out as having such authority." Justice Crowder—"It appears to me the Plaintiff must have known that Morgan had no power to

bind the Company on any but the usual terms." Judgment for Company.—*Tried in Court of Common Pleas, June* 10, 1854. —*From Law Journal Reports, vol.* 23, *page* 166.

719. *Malcolmson* v. *Irish South Eastern Railway Company.* —Action in respect to a cow which Plaintiff's man admitted had the murrain. The cow lay down in the truck and groaned in great agony. The agent refused to convey the cow from Bagnalstown to Dublin. A decree for 40s. was obtained, with liberty of the Judge at Assizes to increase or decrease damages. Chief Justice Monaghan held that a company may refuse to carry *distempered* cattle, or cattle ill of any *infectious disease;* that a company is not bound to carry sick cattle unless owner pays for an entire truck ; that a sender can mix sick and sound cattle in one truck if he likes, but a company ought not to put a sick beast into a truck with other cattle. Such regulations would be reasonable under Cardwell's Act. His Lordship affirmed the decree, as there was an available truck by which the cow could have been conveyed without injury to other cattle.—*Tried before Chief Justice Monaghan, Carlow Spring Assizes,* 1859.—*From Irish Clearing House Reports, No.* 6, *page* 7.

720. *Willis* v. *Great Western Railway Company.*— Action for £21 7s. 6d. for delay to 7 cows, 35 sheep, and 6 pigs, Minety to Wolverhampton. The cattle were loaded at 5 p.m., July 12. Plaintiff had been sending cattle for six or seven years between the same stations, and contended they should leave at 7 p.m. and arrive in Wolverhampton about 7 a.m. next morning. He said there was a second train, which was due at Wolverhampton at 10.30 a.m. The cattle travelled by this train, but on this occasion it was late, and did not arrive till 12.50 p.m.; consequently the cattle did not get into the market until about 1.30 p.m., when the market was over. No sale could be made, and the cattle were sent next day to Birmingham and sold there. Plaintiff informed the Company's clerk at Minety the cattle were intended for the next day's market at Wolverhampton. Plaintiff contended that the cattle, on arrival, were dirty and badly off for food, and were out of condition in consequence of the delay. Plaintiff, in evidence, said about a week after the cattle had been sent he asked the

Company's night inspector, East, at Didcot Junction, "How is it you did not send my cattle on?" and the reply was that he had forgotten them. The Company objected to this evidence. The case was first tried in the Staffordshire County Court. The Judge ruled that the special conditions of the Company relating to the non-liability of the Company for delay were unreasonable, and left the case to the Jury, who gave Plaintiff a verdict for £14 for loss of market and £7 7s. 6d. for injury to condition of the cattle. The Company appealed on the following points:—(1) Whether the Judge was right in admitting the evidence of the conversation with Inspector East; (2) whether the Judge was right in refusing to non-suit the Plaintiff, and whether he ought not to have ruled and directed that there was no evidence for the Jury; (3) whether the Judge was right in his direction. By the Court—"There is no doubt that the night inspector had no authority to answer any inquiries, and our Judgment must therefore be for the Company."—*Tried in the Court of Common Pleas, May* 5, 1865.—*From Law Times Reports, vol.* 12, *page* 349.

(*Sec.* 1, *Taylor on Evidence, par.* 539.—"The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only *when it is made during* the continuance of the agency in regard to a transaction then pending *et dum fervet opus.*" See also *Langhorn* v. *Allnutt*, 4 Taunt., 54; and *Kohl* v. *Janson*, 5 Taunt., 565.)

721. *Prenty* v. *Midland Railway Company.*—Action for £11 for detention of 44 pigs sent from England to Dublin. Plaintiff wished to load 40 pigs in one waggon and pay 2s. 3d. per head for the other four. The Company said he must take half a waggon for the four. He then took a waggon and a half, loading 26 pigs in one waggon and 18 pigs in the half waggon. The number limited for half a waggon was 15 pigs, so on arrival in Dublin Plaintiff was required to pay 2s. 3d. each for the three pigs over half a waggon. This he refused to do, and the 44 pigs were detained. On the first trial the Jury found for Plaintiff £11. The Company appealed, when Chief Baron

Pigott held that the Company were not warranted in withholding delivery of the 44 pigs, and declined to express an opinion as to whether the Company might have had a lien upon the three pigs. Judgment against Company.—*Tried in Court of Exchequer (Ireland), January* 27, 1866.—*From Law Times Reports, vol.* 15, *page* 24.

722. *Malpas* v. *London and South Western Railway Company.*—Action for £4 17s. 6d. for damage to a heifer and five calves owing to detention, Guildford to London. The cattle were loaded on the afternoon of Tuesday, 16th May, but did not reach King's Cross until 7 a.m. Thursday morning. The dispute arose as to whether the contract was to Nine Elms, the Company's London station, or to King's Cross, the North London Company's station. Sender swore he asked the clerk at Guildford what he was to pay for the carriage of the cattle to King's Cross, and he was told 14s., viz., 8s. to Nine Elms, and 6s. for the truck thence to the King's Cross cattle station, and that the cattle would arrive at the latter place about 4 a.m. next morning (Wednesday). The Plaintiff then offered to pay the fare at once, but the clerk said he had better pay at King's Cross. A printed form was then filled up by the clerk and signed by the Plaintiff, who, however, did not read it or have it read to him. The clerk denied this account, and said he told the Plaintiff he could only book to Nine Elms Station, as there would be no train for the cattle market at King's Cross that day, but that he would, if the Plaintiff liked, insert on the consignment note his address at the cattle market. When the cattle reached the market on Thursday morning, Plaintiff paid the whole carriage, 14s., to the North London Company. The consignment note stated—

"To be sent to Nine Elms Station. Consignee, Malpas, New Cattle Market."

And Plaintiff signed under the notice—

"Received from Malpas, of the New Cattle Market, the undermentioned animals, on conditions stated below, and at the special reduced charges below the rates authorised by law."

The conditions were—

"The Company are not to be subject to any risk from consequences arising from overcarriage, detention, or delay in or in relation to the conveying or delivering of the said animals, however caused. The Company are not bound

to send the animals by any particular train, or to carry or deliver them within any certain or definite time, or in time for any particular market."

The case was first tried before Justice Smith, at Michaelmas Term, who left to the Jury the evidence as to whether there was an additional contract from Nine Elms to King's Cross implied by the conversation between the Plaintiff and the clerk. There was evidence that it was impossible to exclude, viz., evidence of the price agreed on, which was not in the memorandum (note), and the memorandum, therefore, did not contain all that passed. The Jury found a verdict for Plaintiff, £4 17s. 6d. A rule was obtained calling on the Plaintiff to show cause why the verdict should not be set aside and a new trial had on the ground that the consignment note signed by the Plaintiff was conclusive evidence of the contract.

On the appeal case Chief Justice Erle said—"On the part of the Plaintiff the oral evidence was very distinct that there was a contract to carry to King's Cross for 14s. The Company produced a paper signed by Plaintiff where the place of delivery is stated as Nine Elms. Both sides agree the cattle were to pass from Guildford to Nine Elms, and then partly on the railway of another company to King's Cross. It is not inconsistent with the contract to carry to Nine Elms that there should be an additional one to carry from Nine Elms to King's Cross. A very material fact not contained in the written contract is that the price to be paid for the carriage (the whole distance) was 14s.; but the price to Nine Elms would be only 8s., and the other 6s. would be for going on to King's Cross. The parol evidence in this case does not alter or contradict the written, but only establishes an additional contract. When the written contract is silent as to price, oral evidence may be admitted to show what it is, and, in my opinion, it showed in this case an additional contract." Justices Willes, Keating, and M. Smith concurred. Judgment against the Company.—*Tried in Court of Common Pleas, January* 12, 1866.—*From Law Times Reports, vol.* 13, *page* 710.

(This case strongly illustrates how careful goods clerks should be in their language, and that a signature to a consignment docket should never be taken unless the sender reads it over; or, if unable to read, the clerk should read it aloud to him, and remark same on the note.)

723. *Shepherd* v. *Bristol and Exeter Railway Company.* —Action for £53 9s., consisting of £33 9s., value of two steers that died, and £20, being £1 per head on 20 cattle that were deteriorated by delay and lost their market. The train bringing the cattle to London was due to arrive at Paddington at 7 a.m. on Sunday morning, whereas it did not arrive until between 11 and 12 a.m. in the morning. Plaintiff met the cattle, but, being liable to a fine for driving cattle through the streets on a Sunday morning after 10 a.m., he was unable to drive the cattle to the Islington Cattle Market. The cattle were consequently penned at the station, and Plaintiff purchased and gave them hay. When Plaintiff's man went for the cattle, something after 12 p.m. on Sunday night, he found two steers dead, and the railway foreman would not deliver him the cattle unless he signed for the two dead ones as part of the whole number of 22. This the Plaintiff's man refused to do, and went for his master, when ultimately the 20 cattle were delivered, but owing to the delay they were not got to the market until 10 a.m. on Monday, when the market was over, and hence they were not sold until Thursday. The case was first heard before Justice Keating, at the Somersetshire Assizes, 1867, when the Jury gave Plaintiff a verdict for the full amount. Leave of appeal was given, the Court to have power to draw inferences of fact.

On the appeal case Baron Blackburn said—"The Company contend that nothing more remained to be done by them under their contract of carriage as carriers when the alleged damage occurred. Had the Company anything more to do as carriers after 2 p.m. on the Sunday? It seems to me clear they had not. I think the argument of the Attorney-General irresistible. The cattle arrived and were taken out of the trucks safely. The Plaintiff's servant was there, and, had it not been Sunday, would at once have driven them away. He was permitted to put them into a pen, where he fed them and shut them up. Had there been pens belonging to A. B. communicating with the station yard, the cattle might have gone there. What difference is there that the pens belong to the Railway Company, and that no charge was made?" Baron Channell concurred. Baron Martin dissented. Judgment of Court for Company.—

Tried in Court of Exchequer, February 7 and May 5, 1868.—*From Law Journal Reports, vol.* 37, *page* 113.

724. *Cox* v. *Great Eastern Railway Company.*—Claim for £20 for conversion of a cow sold by Company to realise 1s., cost of disinfecting the cattle waggon used for carrying the cow. The Plaintiff obtained a verdict in the Ipswich County Court, and the Company then appealed to the Court of Common Pleas, Westminster, to set aside the verdict. The cow was carried on the 18th November, 1867, Diss to Ipswich, and on arrival Plaintiff tendered 5s. 8d. carriage, but refused to pay the 1s. The Company sold the cow, deducted the 1s. and carriage, and tendered Plaintiff the balance. The Company contended that by their private Act, 25 & 26 Vic., cap. 23, sec. 230, they had power to charge for particular services, and that this was a charge within their Act which they had a right to make, and, not being paid it, they had a right to sell. The Judges, without hearing Plaintiff's counsel, were clearly of opinion, without going into the provisions of the Company's private Act, that the charge made was not one the Company could make, the service not being one for the benefit of the Plaintiff in particular, the Orders in Council for cleansing being to prevent the spread of the cattle plague. The service of cleansing done was not a service done to the Plaintiff individually as contradistinguished from the rest of the public. Verdict for Cox.—*Tried in Common Pleas, before Justices Keating, Smith, and Brett, February* 12, 1869.—*From Law Journal Reports, vol.* 38, *page* 151, *C.P.*; *Law Reports, vol.* 4, *page* 183, *C.P.*

725. *M'Court* v. *London and North Western Railway Company.*—Action for loss of two cattle that died on the voyage between Dublin and Liverpool, *en route* for Leicester. The Plaintiff went to the office of the City of Dublin Company and told Mr. Harden, the superintendent, that he wanted to send 31 bullocks to Leicester by the London and North Western Railway Company. Mr. Harden's reply was—"All right; you are in time for the last boat." The Plaintiff brought the cattle to the boat, but got no ticket and paid no

money. A drover's ticket for a herd who accompanied the cattle was issued, headed "City of Dublin Steam Packet Company." It did not in any way refer to the cattle, beyond that it contained a printed notice on the back disclaiming all liability for any injury received by cattle on the passage. On arrival of the cattle at Liverpool the London and North Western Company's porter took possession of the 29 cattle, drove them to the Company's station, and forwarded them by train to Leicester. The Plaintiff then received a document described on the face of it as an "Advice Way-bill," and he then paid to the London and North Western Company the carriage of the 29 cattle through from Dublin to Leicester.

The case was first tried in the Court of Queen's Bench, when it was held that there was evidence of contract between the Plaintiff and the London and North Western Company.

On the appeal case Chief Baron Pigott said—"No evidence was given of the particular arrangements on the subject between the two Companies. How is it unreasonable that the arrangement should be that the Company which received the fare and issued the ticket should be the contracting party, and is not this view of the case strongly corroborated by the fact that no part of the fare was paid in Dublin? The entire fare was paid to the Defendants at their office in Liverpool, and they in return issued what is in the nature of a ticket to the person accompanying the cattle, not for the journey, Liverpool to Leicester, but from Dublin to Leicester. It has been said that the way-bill or ticket issued in Liverpool is only for 29 cattle, and therefore this contract was only to carry 29. But then they issued the ticket and received the fare for the entire journey from Dublin to Leicester. It must be treated as one entire contract to carry for one entire journey from Dublin to Leicester. On the whole, therefore, without going so far as to say that the evidence was conclusive, we are of opinion that it was sufficient to justify the Jury in coming to the conclusion that the Defendants were the parties with whom the contract was made, and that it was one entire contract to carry all the cattle from Dublin to Leicester."

Baron Fitzgerald, in a long Judgment, dissented from the majority of the Court, and said—"I am of opinion that there

was no evidence that Harden had authority from the London and North Western Company to make the through contract. I need hardly say that the fact that Harden was the known agent of the City of Dublin Steam Packet Company as carriers, though coupled with this possibility, was no evidence that in making the contract he was in fact agent for the Defendants. I cannot but think that the fact that Harden was the known agent of the City of Dublin Steam Packet Company as carriers was some evidence that the contract made by Harden was a contract made on behalf of the City of Dublin Steam Packet Company."

The Judgment of the majority of the Court being in favour of the Plaintiff, the Judgment of the Court below was affirmed against the London and North Western Railway Company.—*Tried in the Court of Exchequer Chamber* (*Ireland*), *May* 25 *and June* 5, 1869.—*From Irish Reports, Common Law Series, vol.* 3, *page* 462.

726. *Allen* v. *Lancashire and Yorkshire Railway Company.*—Action for £16 10s. for a cow lost, or rather exchanged, the cow tendered being of less value and afterwards sold by Company for £7 7s. 9d. The cow was one of sixteen booked Dublin to Manchester. The case was first *tried by Recorder of Dublin*, 21*st April*, 1870, who gave a £15 verdict for Plaintiff. The Company to that action pleaded the dealers marked their cattle in a certain way and kept the knowledge of these marks to themselves, and the Company could not identify each man's cattle. *Appeal tried before Baron Hughes, Nisi Prius Court, Dublin*, 11*th May*, 1870. Company pleaded that Plaintiff had a free pass to travel with cattle "solely with the intention of taking care of the animals," but he did not travel by the same steamer as the cattle, and did not attend on the quay at Liverpool until steamer had discharged part of the cattle. The Judge ruled that Plaintiff, having accepted the "pass," was bound to travel with and take care of the cattle, and reversed the decision of the Court below.—*From Irish Clearing House Reports, No.* 50, *page* 92.

727. *Brady* v. *City of Dublin Steam Packet Company.*—Action for £4 8s. 9d. for one pig out of fifteen being deficient,

Dublin to Liverpool. Plaintiff accepted a free pass on condition that it was given "to owners of live stock or their men, solely with the intention of their taking care of the animals." This notice was exhibited over booking-office and on sailing bills. Plaintiff was present on landing of pigs at Liverpool, the cargo-load being driven to Company's yard, Plaintiff accompanying. After selection of each dealer's stock Plaintiff alleged he was a pig short. The Recorder dismissed case on its merits, it being the duty of Plaintiff to look after his property.—*Tried before Recorder of Dublin, July* 21, 1871.—*From Irish Clearing House Reports, No.* 58, *page* 107.

728. *Gill* v. *Manchester Sheffield and Lincolnshire Railway Company.*—Action for £15 for a cow which, after unloading, got off the cattle platform and on to the line, and was run over and killed—Doncaster to Sheffield. On arrival of the train at Sheffield about twenty minutes to seven in the evening, Plaintiff and his man were on the cattle platform to receive the cow. The foreman porter, on the cow being claimed, asked if Plaintiff had signed, and finding he had not, Plaintiff was sent into the office. Plaintiff said, "Don't let her out until I get back." The Plaintiff came back, and the porter was just unfastening the truck. Plaintiff said, "Don't let that cow out; if you do, she will go slap at you." The porter turned and laughed, and said, "She will be right when she gets out." The porter said, "Close the gate;" whereupon Plaintiff said, "I shall go outside," and did so. The porter then drew the bolt; the cow rushed out, and ran about the platform in a wild state. She ran into a pig pen at the end of the cattle platform, and jumped over rails of the pig pen on to the line, and ran into the tunnel and was killed. The Company relied upon the notice on the cattle ticket as to restive cattle to relieve them from liability. Sheffield being worked as a joint station by Manchester Sheffield and Lincolnshire and Great Northern Companies created a difficulty, as the contract was made with and the risk note signed by the Great Northern Company. Plaintiff sued the Manchester Sheffield and Lincolnshire Company, their servants doing the work at Sheffield, and being, he contended, guilty of negligence. The Court of Queen's Bench, on second trial, held

that, owing to an agreement of 17th June, 1875, between the two Companies, the Great Northern Company acted as agents, in making the contract, for the Manchester Sheffield and Lincolnshire Company. The case was first tried before Baron Cleasby, at the Leeds Summer Assizes, when he non-suited Plaintiff on the contract feature of the case. Plaintiff appealed, when Justices Lush and Blackburn held that the mischief was attributable to the porter, who, against Plaintiff's advice, let out the cow before she had been quieted. "We are therefore of opinion the non-suit was wrong, and that the verdict ought to be entered for Plaintiff for £15." Justice Mellor dissented from this Judgment. Judgment against Company.—*Tried in the Court of Queen's Bench, February* 17, 1873.—*From Law Journal Reports, vol.* 42, *page* 89.

729. *Shaw* v. *Great Southern and Western Railway.*—Action for damage to pigs, arising at Maryborough Station, delivered there to be carried to Limerick. It appeared that the pigs, before being loaded, were for some time put in pens at Maryborough, which pens, in accordance with the Order in Council, had been disinfected by the application of a preparation of lime and chloride of lime, and that the pigs, coming in contact with this preparation, were injured and deteriorated in value. On the first trial, in the Court of Exchequer, the Judgment was against the Company. The Company then carried the case to the Court of Appeal, when the Master of the Rolls (O'Sullivan) said—"The defence by the Company admits that the pens in which the pigs were placed were improper pens for their reception. There is no averment that the application of lime-wash was put on the pens at a proper time before the pigs were received, nor even that it was allowed to dry; and it is quite in accord with the defence that the pigs were placed in the pens while the application of the lime-wash was actually wet. The sender of the pigs is not stated to have had any knowledge of such a state of things. He finds his pigs injured by the lime-wash. Although the Company is bound to treat the pen as directed by the Order in Council, it is manifest that want of due care and precaution in the reception of the animals into it may, by taking them into it too soon,

exist. Where the defence, I think, radically fails is that it shows no necessary connection between compliance with the Order in Council and the pens being injurious at the moment of reception, which may be the entire cause of the injury. It is the unanimous opinion of the Court that the Judgment of the Exchequer Division was correct." Judgment against the Company.—*Tried in the Court of Appeal, January* 26 *and* 28, 1881.—*From Law Reports (Ireland), vol.* 8, *page* 10.

HORSE CASES.

Horses Delayed and Injured.

Case No

Anderson v. *Chester and Holyhead* (1853) 730
Horses missed Shrewsbury Fair—Special contract to carry in time for fair proved—Company held liable.

Bollands v. *Manchester Sheffield and Lincolnshire* (1863) ... 731
Horses delayed.

Robinson v. *Great Western* (1866) 732
Horses carried in trucks delayed 24 hours—Special contract did not exempt Company from liability.

Waller v. *Midland Great Western* (1879) 733
Failure to supply horse-boxes, and the horses were walked 24 miles and injured—Company held not liable.

Wood v. *Great Northern (of Ireland)* (1880) 734
Held, that putting a horse to livery in the absence of it being claimed by consignee on arrival is tantamount to delivery to consignee.

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730. *Anderson* v. *Chester and Holyhead Railway Company.*—Action for delay to horses, Dublin to Shrewsbury, whereby they missed the fair. Plaintiff and his witnesses swore that the Company's clerk, George Jones, made a special contract binding Defendants to have the horses in time for the 9 a.m. train, Holyhead to Chester, and so on to Shrewsbury in time for the fair. The second count averred unreasonable delay and negligence, and that there were not sufficient horse-boxes at Holyhead until 5 p.m. same day. Company denied their clerk made the special contract, and maintained, if he had done so, he had no authority to do so on behalf of Company; that by the conditions at back of receipts the Company were not to be held responsible for accidental or unavoidable delay, and that they had used due diligence. The Chief Justice left it to the Jury to say whether a special contract had been made, and if so, what amount of damages. He decided, as a point of law, that Jones, placed in the position in Company's office, taking money from the public for carriage of

goods and cattle, had inferentially authority to bind the Company by such a special contract. The Chief Justice said on the second count the Defendants had used due diligence. The Jury found for Plaintiff on first count £250 damages, and for Defendants on second count.

The Company objected to the Judge's charge—(1) That the question should not have been left to the Jury, that he should have directed them that the conditions on the back of the receipt note did form part of the contract; (2) that the extent of Jones's authority to make the contract relied upon was a question for the Jury, and should not have been kept from them.

Upon the subsequent trial of the bill of exceptions, the following authorities were relied upon in support of first exception:—*Fowles* v. *Great Western Railway* (7 Exchequer Reports, p. 699); *Carr* v. *Lancashire and Yorkshire Railway* (Exchequer Reports, p. 707); *Shaw* v. *York and North Midland Railway* (13 Queen's Bench Reports, p. 347); *Austin* v. *Manchester and Sheffield Railway* (16 Queen's Bench Reports, p. 600); *Walker* v. *York and North Midland Railway* (3 Car. & Kir. Nisi Prius Cases, p. 279); *The York Newcastle and Berwick Railway Company, Appellants, Crisp and Thompson, Respondents* (23 Law Times Reports, p. 79).

The Court held the Lord Chief Justice was right in leaving the question to the Jury as to whether the conditions on back of receipt note formed part of the contract or not.

With regard to the second exception the following cases were relied upon:—*Alexander* v. *Mackenzie* (6 C.B., p. 766), and *Giles* v. *Taff Railway* (2 Ellis and Black's Queen's Bench Reports, p. 822). The Court also held that the Chief Justice was right, and that they were very much influenced in this view by the course pursued by Lord Chief Justice Jervis in *Wilson* v. *York and Newcastle Railway Company* (17 Law Times, C.P., 223). Judgment against Company.—*Tried before Lord Chief Justice, Common Pleas (Ireland), December* 2 *and* 3, 1853.—*Reported in Irish Common Law Reports, vol.* 4, *page* 435.

731. *Bollands* v. *Manchester Sheffield and Lincolnshire Railway Company.*—Action for damage to fifteen colts from

delay. The damage was that several of them had capped hocks and colds. They were booked through from Dublin to Lincoln, *via* Liverpool. The detention took place at Retford, where they arrived at 12.35 a.m., April 18 (Good Friday), and were taken on at 10.30 a.m. same morning by the next train going to Lincoln. It appeared that on some late previous occasion Plaintiff had had horses taken forward from Lincoln at 3 a.m., but the train that had then taken them forward had been discontinued, and the case turned upon the fact of whether Plaintiff should or should not have been advised of the discontinuance of that train. The colts were declared as under £10 in value, and were carried as a truck-load, like cattle.

The case was first tried at Naas, during the Summer Assizes, 1862, when the Lord Chief Justice held that the Company were bound to give the public notice of the alteration of the goods train, and a verdict was given for Plaintiff.

On the appeal case Chief Justice Lefroy said—"I think there should be a new trial, for the purpose of putting more distinctly to the Jury that it was the duty of the Plaintiff—to whom it was an important object that his horses should be delivered at Lincoln at a particular time—to have ascertained whether the Company would undertake, or whether their system of traffic continued to be such as would enable them to undertake, to deliver the horses at that particular time. The Company had changed their practice for a considerable time before, and therefore they may have imagined that the public had been apprised of the change. If there was any default it was on the part of the Plaintiff, and not of the Company. They were not in default, and if the necessities of their traffic made it necessary for them to change the system, they had a right to do so." Judgment for Company.—*Tried in the Court of Queen's Bench (Ireland), January* 19 *and* 20, 1863.—*From Irish Reports (Common Law), vol.* 15, *page* 560.

732. *Robinson* v. *Great Western Railway Company.*—Action for £60 for 24 hours' delay to twelve horses at Wolverhampton, sent from Shipton by goods train at the lower rate. Sender signed a way-bill containing the clause—"I hereby agree that the same (horses) are to be carried at the owner's

risk." The horses were intended for Manchester, but there was no through rate from Shipton. The Shipton station-master told sender if the horses were sent by a certain time they would catch the London and North Western Company's goods express at Bushbury Junction. The ticket was made out Shipton to Wolverhampton, and Bushbury Junction is a mile beyond Wolverhampton Station; and the case turned upon whether the contract was to Wolverhampton or to Bushbury Junction. Plaintiff had a drover's pass, but travelled to Wolverhampton by passenger train; and he called on the Wolverhampton station-master and told him the horses were coming on by goods train, and that official promised to have them forwarded on to Bushbury Junction in time for the London and North Western train. It was admitted on the trial that if the Defendants undertook to deliver at Bushbury Junction there was a delay of 24 hours, but if they only undertook to deliver at their ordinary station at Wolverhampton, and then someone was to fetch the horses and take them to Bushbury Junction, there was no delay. Jury found £60 damages, or £5 per horse, against Company.

On the appeal case Chief Justice Erle said—"There was some evidence that the contract meant to Bushbury Junction, and that was left to the Jury. The condition of the special contract means that if anything happens to the horses going along the journey the Company are protected; but, by their contract, they were to deliver in reasonable time. If a company undertakes to carry in 24 hours at owner's risk, and a horse is damaged on the road, I think they are not liable for such damage, but that they would be liable for the consequences if not arriving in reasonable time." Judgment against Company.—*Tried in Court of Common Pleas, Nov.* 23, 1866.—*From Weekly Reporter, vol.* 14, *page* 206.

733. *Waller* v. *Midland Great Western Railway.*—Action for damage arising to a number of horses which were walked by road from Athboy Station to Dublin, a distance of 24 miles, through the Railway Company having failed to provide horse-boxes, pursuant to contract, for the conveyance of the horses for sale by auction in Dublin on the day but one

following. The owner was compelled to send them by road, in order that they might arrive in due time for sale and for previous inspection by purchasers. The horses, which were valuable hunters, were in soft condition at the time. They were deteriorated in appearance by the fatigue of the road journey. One of them was lame, and such as were sold realised prices below what would otherwise be obtained, the other one being left on the owner's hands. It appeared if they had been in hard-fed condition they would have borne the journey without injury. The Company's station-master was at the time of the contract aware of the intended sale, and of the day on which it was to take place. Held, reversing the decision of the Queen's Bench Division, with damages £200—That the Company were not liable in damages for the entire of the loss which the owner sustained in consequence of the injuries occasioned to the horses by the road journey, but that the measure of damages was the deterioration which the horses, if in ordinary condition and fed to make the journey, would have suffered thereby, and the time and labour expended on the road. This was practically a Judgment in favour of the Company.—*Tried in the Court of Appeal (Ireland), May* 13, 14, *and* 16, 1879.—*From Law Reports (Ireland), vol.* 4, *page* 376.

734. *Wood* v. *Great Northern (of Ireland) Railway Company.*—Action for £15, value of a horse not delivered, Belfast to Armagh. The horse duly arrived at Armagh, consigned to D. Wood, and, no person being at the station to meet and accept delivery of the horse, it was sent to livery. A Mr. James Woods, hearing accidentally there was a horse at livery in his name, went to the livery stable keeper and got the horse. Mr. D. Wood subsequently on same day applied for the horse, and found it had been delivered to Mr. James Woods. The horse was subsequently taken to D. Wood's house and offered to him, but he refused it, and Mr. James Woods then returned it to the livery stable keeper, who, after giving notice, sold the horse at auction for its keep.

The Judge decided in favour of the Railway Company, holding that their contract was to carry the horse to Armagh that

Plaintiff should have been there waiting to receive it, or applied within reasonable time after the arrival of the train, and as he was not there the Company were justified and bound to put the horse to livery as they had done, and having done so they had completed their contract, and their liability ended; and that afterwards the Company became the agents of the Plaintiff, and were clear of anything that might happen afterwards; and that any cause of action for wrong delivery from the livery stable to James Woods lay between the Plaintiff and the livery stable keeper. Judgment for Company.—*Tried at the Quarter Sessions, Castleblaney, 30th December*, 1880.—*From Report to Irish Clearing House, No.* 87, *page* 177.

(Although this is only a Quarter Sessions case, it establishes what would be a useful principle, and it is inserted in the expectation that a similar decision may be obtained in a higher Court.)

Horses Killed and Injured in Transit.

(*See also under "Special Contracts."*)

Case No.

Palmer v. *Grand Junction* (1839) 735
Company, not able to prove a special contract, were held to have carried the horses as common carriers, not as special carriers.

Shaw v. *York and North Midland* (1849) 736
Horse killed in horse-box from defective partition—Company held not liable under their printed notice on ticket.

Austin v. *Manchester Sheffield and Lincolnshire* (1850) 737
Hot axle set wheel on fire—Truck broke down, and seven horses were injured—Company held not liable.

Great Northern v. *Morville* (1852) 738
Horse in horse-box injured by concussion in shunting—Company held exempt from liability owing to special contract.

M'Manus v. *Lancashire and Yorkshire* (1859) 739
Horses damaged by kicking hole in cattle truck—Company held liable in face of special contract.

M'Cance v. *London and North Western* (1861) 740
Horses declared at £10 value each—Company held not liable for a greater value per horse.

Lloyd v. *Waterford and Limerick* (1862) 741
Company offered two rates, owner's and Company's risk—Plaintiff accepted owner's risk—The horses were injured—Held, that the alternative rate at Company's risk was unreasonable, and hence there was no special contract.

Case No.

Moffat v. *Great Western* (1867)... 742
Company held liable for a mare strangled in a horse-box, because one halter was longer than the second one.

Kendall v. *London and South Western* (1872) 743
Horse damaged—No negligence or explainable cause—Held to be the inherent vice of the animal, and Company free from liability.

Moore v. *Great Northern* (*Ireland*) (1882) 744
Horse injured on unloading platform after being unloaded.

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735. *Palmer* v. *Grand Junction Railway Company.*—Action for £150 for one horse killed and eight more or less injured, owing to an accident near Birmingham. The horses were being carried, Liverpool to Birmingham, in 1838, in three horse-boxes, "being a kind of caravan constructed for the purpose on four wheels, and adapted to the railway." A ticket was issued as follows:—

"*Ticket for Horses and Carriages.*—From Liverpool to Birmingham, 4½ o'clock train, February 3, 1838—Palmer, nine horses to Birmingham—Carriage £10 10s.—Paid, E. C.

"This ticket is issued *subject to the owners undertaking all risks of conveyance whatsoever*, as the Company will not be responsible for any injury or damage (however caused) occurring to horses or carriages travelling upon the Grand Junction Line."

It appeared some labourers in the employ of the Company had been working at a culvert or drain, and had taken down some part of the fence, and a horse strayed on to the line and had lain down upon the railway. This obstruction had thrown the train off the line and caused the injury. The case was first tried before Chief Justice Tindal, at Warwick, when the Jury found gross negligence in the Company, and that *no ticket had been given consignee*, and a verdict for £150.

The Company appealed, when Baron Parke said—"The Company's Act does not compel them to be common carriers—it only enables them to be so, so far as they shall think fit; and when they have elected to become so, they are liable in that character in the same way that other common carriers are. If the Company choose to carry, and do not take care to accept the goods with a limited responsibility—of which we are to assume there is no evidence in the present case—then the

question is whether the common law duty is not cast upon them; and I am of opinion that it is, and that, having received these horses to carry them from Liverpool to Birmingham and safely deliver them, which they have not done, they are liable." Barons Alderson and Gurney concurred. Judgment against Company.—*Tried in Court of Exchequer, Vacation Sittings after Hilary Term*, 1839.—*From Meeson and Welsby's Reports, vol.* 4, *page* 749.

736. *Shaw* v. *York and North Midland Railway Company.*—Action for £183 15s. for a horse that had fallen in a horse-box and killed himself, owing to a defective partition having become loose, York to Watford. The Plaintiff sent nine young horses. Plaintiff, when loading the horses, objected to one horse-box, as a screw was loose and a partition between the stalls was insecure, whereupon one of the Company's servants endeavoured to remedy the defect, and assured the Plaintiff that the box was quite safe. After loading, Plaintiff paid the carriage and received a ticket containing the following printed notice at bottom:—

"*N.B.*—This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the Company will not be responsible for any injury or damage (however caused) occurring to horses or carriages while travelling, or in loading or unloading."

On arrival at Normanton, owing to the partition having become loose again, the horse had fallen and killed himself. The case was first tried at the York Spring Assizes, 1848, before Baron Alderson, when the Jury gave a verdict to Plaintiff for the £183 15s. The Company obtained a rule calling upon Plaintiff to show cause why there should not be a new trial on the ground of misdirection. Chief Justice Lord Denman, in giving Judgment, said—"It appears to us to be clear that the terms contained in the ticket given to Plaintiff form part of the contract for the carriage of the horses, and that the allegation in the declaration that the Company received the horses *to be safely and securely carried by them*—which would throw the risks of conveyance upon the Company—is disproved by the notice at the foot of the ticket; and the alleged duty of the Company safely and securely to carry and convey the horses

would not arise upon such a contract. It may be that, notwithstanding the terms of the contract, the Plaintiff might have alleged that it was the duty of the Company to have furnished proper and sufficient carriages, and that the loss happened from a breach of that duty; but the Plaintiff has not so declared, but has alleged a duty which does not arise upon the contract as it appeared in evidence." Judgment for Company.—*Tried in Court of Queen's Bench, Feb.* 24, 1849.—*From Law Journal Reports, vol.* 18, *page* 181.

737. *Austin* v. *Manchester Sheffield and Lincolnshire Railway Company.*—Action for damages to seven horses carried in a cattle truck, New Holland to London. Owing to a hot axle the truck was thrown out of position, and the injury arose. During stoppage at a station the Plaintiff requested that the horses should be taken out; this was not done, and on the journey being resumed the axle again became hot and on fire, and the accident occurred. The Company pleaded a special contract and notice at the back of the cattle ticket, as follows:—

"This ticket is issued subject to the owners undertaking to bear all risk of injury by conveyance and other contingencies, and the owner is required to see to the efficiency of the carriage before he allows his horses or live stock to be placed therein, the charge being for the use of the railway carriages and locomotive power only. The Company will not be responsible for any alleged defects in their carriages or trucks unless complaint be made at the time of booking or before the same leave the station; nor for any damages, however caused, to horses, cattle, or live stock of any description travelling upon their railway or in their vehicles. I have examined the carriages, and am satisfied with their sufficiency and safety. (Signed) Davis, for Austin, owner or on behalf of owner."

The rate for the consignment of the three waggon-load of horses was £22 10s., which the Company proved was a reduced rate, and that in horse-boxes the charge would have been £50. The Jury found that the accident was occasioned by the fire, and that there was negligence on the part of the Company in proceeding from the station with the truck when Plaintiff requested the cattle should be taken out. Verdict for Plaintiff. Justice Erle gave leave to move for a new trial.—*Tried at the London Sittings after Hilary Term*, 1850.

The new trial came on in the *Queen's Bench in* 1851, *before Judges Patteson, Coleridge, Wightman, and Erle.* Judge Patteson held that there had been a special contract, although Plaintiff disputed it. "The gist of the complaint is not simply breach of the ordinary duty of a common carrier, nor of that arising on the special contract, but negligence in persisting to go on with the insufficient truck after notice and request. But I cannot agree to this. The breach must arise by virtue of contract or duty. There might be misconduct without reference either to the contract or the duty, but a complaint for that should be framed in a different way. The breach is made to arise upon the duty of the carrier as a common carrier. The ticket is more than a mere notice; it is a special contract which Defendants made in consequence of the charge being lowered." The other Judges agreed. Judgment for Company.—16 *Queen's Bench Reports, page* 600; *Law Journal, vol.* 20, *page* 335.

738. *Great Northern Railway Company* v. *Morville.*—Action for £27 for a horse injured in a horse-box during shunting of the train, Kirkstead to Wakefield. On August 14, 1851, Plaintiff delivered the horse, and it was safely placed and tied up in the horse-box. Plaintiff then went into the office, paid the carriage (19s. 6d.), and signed the usual risk note, getting a duplicate thereof. In the note he signed was the following sentence, which was not in the duplicate :—"I have examined the carriages, and am satisfied with their efficiency and safety." The case did not, however, turn on this point. On arrival at Knottingley the horse-box had to be shunted on to another train, and in so doing a concussion took place between the horse-box and another vehicle, to which the injury was attributed. Plaintiff contended that the ticket was a mere notice or restriction of the common law liability of the Company, and such as was void under the 4th section of 11 Geo. IV. and 1 Will. IV., cap. 68. The Company contended the ticket formed a special contract whereby they were relieved of any common law liability of a carrier. The case was first tried in the Pontefract County Court, when the Judge, after consideration, gave Plaintiff a verdict for £21 on the ground that the injury was the result of the want of due care in shunting the

horse-box at Knottingley. An appeal was taken to the Queen's Bench, when Judge Coleridge gave Judgment, saying—"I am of opinion the Judgment must be for the Company, and that the verdict below was wrong. This case, I think, falls within section 6 of the Act, where the carrier is permitted to make a special contract. The Plaintiff comes with his horse to the station, pays for the carriage of it, and the clerk produces the ticket. Whether the Plaintiff signs it or not is immaterial; if he agrees to the terms set forth in it he is bound by them. It is clear that he did agree to them here; the Company consequently is protected in this action." Justice Erle said—"It is perfectly clear that the Company undertook to carry the horse upon the terms that they were not to be responsible for damages that might happen to it. The consideration for the Plaintiff assenting to the agreement was the carriage of the horse by the Company on the payment of the fare. Whether the Plaintiff had signed the paper or whether the clerk had mentioned what the terms were, there would have been in each case good evidence of an agreement between the parties. The 4th section of the Carriers' Act provides that public notices shall no longer be of avail. It used to be a constant question whether knowledge of a public notice was brought home to the party sending the things to be carried, to prevent which question it was provided in the Act that 'public' notices shall be no longer of any avail. But that section does not affect section 6, by which every carrier is left free to make a special agreement with the party sending goods. Assuming the Defendants to be common carriers in the widest possible sense, I think that this is a special contract under section 6, and that the Defendants are protected by it." Judgment for Company. —*Tried in Court of Queen's Bench, May* 10, 1852.—*From Law Journal Reports, vol.* 21, *page* 319.

739. *M'Manus* v. *Lancashire and Yorkshire Railway Company.*—Action for damages to three horses, from a hole being made in bottom of cattle truck during transit, Liverpool to York. The truck externally, and as far as Company knew, was fit. Plaintiff signed Company's risk note, as follows:—

"This ticket is issued subject to owners undertaking all risks of conveyance,

loading and unloading whatsoever, as the Company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling on the Lancashire and Yorkshire Railway or in their vehicles."

Twopence per mile was charged, while conveyance in horse-boxes on passenger trains was fourpence per mile. Plaintiff pleaded that terms of notice did not extend to protect a defect in the truck itself; and, if it did, the condition was unreasonable, and should be disregarded under 17 & 18 Vic., cap. 31 (Railway and Canal Act). The Court gave a verdict for Company, on the ground that the special contract was reasonable and within the power of the Company to make. Baron Martin gave Judgment, and quoted *Simon* v. *Great Western Railway Company* (18 Common Bench, 805); *Pardington* v. *South Western Railway Company* (1 Hurlstone and Norton, 392); and *Chippendale* v. *Lancashire and Yorkshire Railway Company* (21 Law Journal, 22 Queen's Bench). He said—"Supposing the special contract was held unreasonable, the Company were not responsible, no negligence being shown; and the rule as to the liability of carriers for all losses (not caused by the act of God or the Queen's enemies) *did not extend to horses or live animals.* In the case of *Chippendale*, the Judgment furnishes a direct authority that the special contract extends to defects in the trucks. The Jury found that the truck was unfit and unsafe, and that the damage to the cattle was consequent upon it. The Court think that the risk in the conveyance of live cattle is the risk of their breaking the trucks or boxes in which they are conveyed." Judgment for Company.—*Tried before full Court of Exchequer, January* 26, 1858. (*N.B.*—In *Pardington's Case* it was stated the special contract included "from suffocation, or from being trampled upon, or bruised, or otherwise injured in transit, from fire, &c.)

An appeal from this decision was taken to the Exchequer Chamber, and the Judgment was reversed, Judgment being against the Company. Justice Williams said—"The Court agree with the opinion expressed by Chief Justice Jervis, in *Simons* v. *Great Western*, that the true construction of the Act (17 & 18 Vic., cap. 31) and the result of its provisions is this—'That the Company may make special contracts with their customers, provided they are just and reasonable, and signed; and

whereas the monopoly created by railways compels the public to employ them in the conveyance of their goods, the Legislature have thought it fit to impose the further security that the Court shall see that the conditions or special contract is just and reasonable.' In effect, before the statute, every case in which a special limited liability was substituted for the general common law obligation of the carrier, whether by notice acquiesced in or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of law. It remains to consider whether the condition of special contract in the case before us is just and reasonable, and we are of opinion it is not. In order to bring the Company within its protection it is necessary to construe it as excluding responsibility for loss occasioned, not only by all risks of whatever kind directly incident to the transit, but also for that caused by the insufficiency of the carriages provided by the Company, though occasioned by their own negligence or misconduct. The sufficiency or insufficiency of the vehicles by which the Company are to carry on their business is a matter, generally speaking, which they and they alone have, or ought to have, the means of fully ascertaining; and it would, we think, not only be unreasonable, but mischievous, if they were to be allowed to absolve themselves from the consequences of neglecting to perform properly that which seems naturally to belong to them as a duty. It is unreasonable that the Company should stipulate for exemption from liability from the consequences of their own negligence, however gross, or misconduct, however flagrant; and that is what the condition under consideration professes to do. That condition is therefore void, and the case stands simply upon the ground that the Plaintiff has employed the Defendants to carry his horses safely, and that they have used an insufficient and improper vehicle for that purpose, whereby the horses have been injured. This being the opinion of the majority of the Court, the Judgment of the Court of Exchequer is therefore reversed, and our Judgment is for the Plaintiff." Justices Crompton, Crowder, and Willes concurred.

Justice Erle dissented, and, in relation to a carrier's liability, he said—"If a person chooses to profess to be a common

carrier, the law creates a duty to receive things brought for carriage, and he may be liable, *ex delicto*, for a refusal to receive —*Pickford* v. *Grand Junction* (8 M. & W., 372). But this duty is regulated according to his will in many respects. He may choose the kind of conveyance, the times of transit, the mode of delivery, the articles that he will profess to carry, what price he will have, when he shall be paid; and the duty to receive is always limited by his convenience to carry—*Jackson* v. *Rogers* (2 Show, 327), *Johnston* v. *North Midland* (4 Exch., 367). This right to qualify the duty of receiving according to terms and conditions fixed by the carrier alone comprises the right to qualify the common law duty of insuring safety, a duty which has given rise to much discussion. Lord Hale, in *Morse* v. *Slue* (1 Vent., 238), says—'If a carrier will, he may make a caution for himself, which, if he omits and takes in goods generally, he shall answer for what happens.' A carrier's duty to receive and his right to reject—in some cases absolutely, in others conditionally—without regard to the will of the customer, and therefore without special contract, remained as before the passing of 11 Geo. IV. and 1 Will. IV., cap. 68" (*H. & N.*, vol. 4, page 336). Judgment against Company.—*Tried in the Exchequer Chamber, May* 17, 1859.—*Law Journal Reports, vol.* 28, *page* 353.

740. *M'Cance* v. *London and North Western Railway Company.*—Action for £40 for injury to two horses and the death of a third, resulting solely from the defective state of the bottom of a waggon—Liverpool to Wolverhampton. There were seven horses sent in the truck. Plaintiff signed a declaration that the horses did not exceed £10 each in value, and at the end of the declaration was—

"And in consideration of the rate charged for conveyance of such horses, I hereby agree that the same are to be carried entirely at the owner's risk."

The Company's usual notices were on the back of the cattle ticket. Plaintiff admitted in Court he purchased the horses for sums varying from £30 to £35 each. Four of the seven horses belonged to Keating, but they were all booked in Plaintiff's name; but Keating acted for Plaintiff, and booked them, and made a cross to Plaintiff's name at foot of declara-

tion. Keating swore the declaration was not read over to him, and that he could neither read nor write; that he did not know what the declaration was, but thought it referred to the loading or unloading. The Company's clerk swore he read over the declaration to Keating, and the Court believed him. The case was first tried at the Liverpool Summer Assizes, when a verdict was given for the Plaintiff for £40. The Company had leave to appeal.

On the appeal case Chief Baron Pollock said—"I think the declaration of the value is no part of the agreement to carry. It was a declaration made expressly with a view to induce the Company to carry. It was falsely made to induce them to carry—that is, to enter into the contract. I am of opinion that when persons have made a declaration of that sort for the purpose of inducing others to act, and they have acted upon it, and it turns out to be false, they are so far bound by it that it should not be imposed on a Jury to find any other value than the value the parties themselves have set upon their property."

Baron Bramwell concurred, and said—"I consider myself bound by *M'Manus's Case*, and therefore that the latter part of the declaration—that the horses are to be carried without any risk on the part of the Company—is an unreasonable condition. I think the declaration of value of £10 per horse is not part of the contract, and therefore it is open to them to set it up as affecting damages. Here is a man attempting to make a claim, to my mind dishonest—a claim unjust to his own knowledge and contrary to his engagement; and unhappily, when he comes into the witness-box, he is tempted to support it on oath by a statement not true (declaration not being read over to him). He says—'True, I have entered into a contract; but it is unreasonable, and by a little colouring of the case I can make the Railway Company liable.' I should like to refer to the case of *Clarke* v. *Gray* (6 East, 564), where a common carrier's limitation of liability to £5 was held not to be a qualification of the contract. The object of the clause is defined by Lord Ellenborough—'Its proper office is to limit the province of the Jury in the assessment of damages for a broken contract, and of course has no concern with it as long as it is executory

and in the course of its performance.'" Baron Wilde said—"The Plaintiff ought not to have damages except upon the footing that the horses were worth £10 each." Verdict against Company for £25, the amount that had been paid into Court, and the estimate of the damages at the rate of £10 per horse.—*Tried in Court of Exchequer, Nov.* 19, 1861.—*From Law Journal Reports, vol.* 31, *page* 65, *Exchequer.*

Plaintiff appealed to the Exchequer Chamber, when the Judgment was affirmed, it being held that the declaration of the value of the horses was not part of the contract between the Plaintiff and the Company, but a statement of a fact by the Plaintiff, assumed and agreed to by the Company as the basis upon which the contemplated contract was to be framed; and that consequently the Plaintiff was not at liberty afterwards to deny the truth of this conventional state of the facts, nor to show that the real value of the horses exceeded £10 each. Judgment for Company.—*From Law Journal Reports, vol.* 34, *page* 39.

741. *Lloyd* v. *Waterford and Limerick Railway Company.*—Action for £300 for delay and consequent injury to seventeen horses, Limerick to Dublin. Sender, before forwarding the horses, wrote to the Limerick station-master to know whether horses could be forwarded from Limerick to arrive in Dublin in time to be shipped to England the same day. The station-master replied by letter that "the horses might be sent for the special 8 a.m. train next day." The Company had two rates and two forms of consignment notes. Condition A, for the lower rate, absolved the Company from all liability in respect of the carriage of horses. Condition B, attached to the higher rate of 20 per cent. extra, was that the Company would not be liable for any injuries unless pointed out to the Company's agent at the time of unloading; that the Company should not be responsible for the delivery of horses at any particular time or for any particular market or race meeting; that the Company would not be liable for more than the value of horses specified in the Railway and Canal Traffic Act, 1854, unless the excess of such horses' value be declared at the time of delivery, and there would be a

charge of 5 per cent. extra in such cases on the value. The Plaintiff paid the lower rate under condition A. The printed form to be filled up by sender of live stock purported to be signed by Mr. Whiteside, the Plaintiff's assistant. It was not signed by him, though it was by the clerk under his authority, but Mr. Whiteside had no authority to depute a third person to do so.

Plaintiff contended that under the Company's risk rate B the conditions were unreasonable, and that, although he had an alternative rate offered, its conditions being unreasonable it was not a fair and reasonable alternative to offer him. Under the Company's risk rate "the Company are not to be liable for injury unless pointed out at the time of delivery," when the injury is, and necessarily must be, unknown. The condition B is therefore unreasonable, and the contract falls to the ground.

The Court held as follows:—"We disallow the demurrer in this case on the grounds that the condition A, as it stands by itself, was an unreasonable one, and that the contract for conveyance could only be made reasonable in case the alternative condition B were reasonable; and as that part of the condition B which obliged the party to point out at the time of unloading the injuries the animals might have sustained in their transit or conveyance was unreasonable, therefore the contract (as a whole) was unreasonable."—*Tried in Court of Queen's Bench, Dublin, April* 25, 1862.—*From Law Times Reports, vol.* 9, *page* 89; *and Irish Jurist, vol.* 14, *page* 241.

742. *Moffat* v. *Great Western Railway Company.*—Action for a mare strangled in a horse-box at High Wycombe Station. The mare had been loaded in a horse-box which was waiting for the train. A porter, hearing a noise, looked into the box and found that the mare had got her foot into the manger in front of her. She then slipped, and was strangled by the head rope before a knife could be got to cut the rope. She was tied with two ropes, one two feet and the other three feet long. It was not stated who tied her up. Plaintiff maintained that the two ropes should have been only 18 inches long. Justice Keating told the Jury—"The negligence suggested here was that the

halters were not of the same length. It was for the Jury to decide this. It was for them to consider whether it is reasonable on the part of the public to expect that a railway company should gauge at their peril the length of a halter which a blood horse, as distinguished from other horses, required. The viciousness of the animal was also a question for them to decide." The Special Jury gave a verdict against the Company for £20. *Tried in Court of Common Pleas, February* 4, 1867.—*Law Times Reports, vol.* 15, *page* 630.

743. *Kendall* v. *London and South Western Railway Company.*—Action for injury to a horse. The Plaintiff delivered the horse to go to Ewell. The horse was carefully loaded; it had the saddle on, and the stirrups were hanging down as if for riding, and the porter who loaded the horse said it would be safer to leave them so than draw them up to the top of the stirrup leathers. Nothing went wrong with the train, nor was the horse heard to be kicking on the journey, nor were there any signs of fresh kicking by splintered wood or otherwise; yet at the journey's end the horse was found to have sustained severe injuries, such as a cut on the forearm and several cuts on the hocks, besides a dislocated fetlock joint of the hind leg. The Company relied upon their public notice as a defence. The case was first tried before Baron Martin, at the London Sittings, when a verdict was given for the Company. The Plaintiff appealed, and on the appeal case Baron Bramwell said—"There is no doubt in this case the horse was the immediate cause of its own injuries—that is to say, no person got into the box and injured it. It slipped or fell, or kicked or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, 'its proper vice'—that is to say, from fright or temper, or struggling to keep its legs—the Company are not liable. If from the Company's negligence, it would be otherwise. If perishable articles, say soft fruit, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. The evidence of the Plaintiff makes it *improbable* it was the 'proper vice' of the horse. The evidence of the Company makes it *impossible* it was otherwise." Baron

Martin concurred. Baron Pigott dissented, and said—"I infer (there being no negligence on either side) that the animal was either thrown or got down in the box, and in struggling to get up again received the injuries. In my opinion the cut on the forearm was clearly caused by its lying on the stirrup, and the injuries on the hocks and fetlock by struggling and kicking on the floor of the box. Since the case of *M'Manus* v. *Lancashire and Yorkshire* there is no distinction, in safely carrying, between live animals and merchandise. This present case is reduced to one of onus of proof, and upon whom is such onus cast? It seems to me the carrier should, if he rely upon any exception to his common law liability, show by affirmative proof that the case is brought within the exception. I therefore think the Plaintiff entitled to recover." The majority of the Court holding the contrary opinion, Judgment was given for the Company.—*Tried in Court of Exchequer, April* 27 *and June* 10, 1872.—*From Law Journal Reports, vol.* 41, *page* 184.

744. *Moore* v. *Great Northern Railway (Ireland) Company.*—Action for injury to a racehorse, "Beauchamp the Second," Dublin to Gormanstown. On the Gormanstown Station there was a lot of lumber and baskets on the platform, which left only a narrow passage for the horse between the baskets and the edge of the platform, part of which was taken up with the coping-stone. The horse got his leg between the coping-stone and the horse-box, and was thereby injured and prevented from running at Bellewstown. The horse shied at the baskets, and his foot slipped on the coping-stone. It was raining heavily at the time, but if he had not shied he could have gone past as five other horses had done before him. The horse was carried at owner's risk, and the Company's usual conditions signed. The Jury on the first trial gave a verdict for the Plaintiff.

On the appeal case Justice Fitzgerald said—"The Plaintiff selected the reduced rate, and signed the contract ticket and conditions. The full rate for the six horses was £1 16s.; the reduced rate was £1 12s. No question arose on the reasonableness of the rate. The learned Judge in the previous trial considered the following condition to be unfair and unreasonable,

namely—'In no case will the Company be liable for injuries caused by fear or restiveness of animals.' We are of opinion that this only applied to all cases in which the injury arises from the fear or restiveness created by the transit in its ordinary accompaniments, and without any negligence or default on the part of the Company—such, for instance, as contiguity to the engine, noise of the engine, or whistling, shunting, passing trains, &c. Taken in that limited sense, we are of opinion that the condition was not unreasonable. For myself, I desire to say that I was much struck by the Judgment of Lord Justice Bramwell in *Lewis* v. *Great Western*, and would be inclined, if necessary, to adopt his broad common sense; and, applying some of his observations to the present case, I should say the most cogent evidence that the whole contract was fair and reasonable is afforded by the fact that the Plaintiff accepted and signed it, and not for the first time. He is a professional owner of horses, and knows the risks to which they are exposed on the rail; yet he consents to the contract, and trusts, in case of loss, to the ingenuity of counsel to show in some way or other that it is not just or reasonable. Upon the whole, we are of opinion that the alternative contract offered to the Plaintiff was limited only by conditions which were just and reasonable, and that in lieu of that the Plaintiff having voluntarily accepted and signed a special contract by which he practically took upon himself all risks, he is not now, under the circumstances of the case, entitled to recover." Judgment for Company.—*Tried in the Court of Queen's Bench Division, February* 16 *and March* 4, 1882.—*From Law Reports* (*Ireland*), *vol.* 10, *page* 95.

HORSES KILLED ON RAILWAY CROSSINGS AND STATIONS.

Case No.

Fawcett v. *York and North Midland* (1851) 745
Horses strayed on to a level crossing, the gate having been left open, and were killed—Company held liable—Faulty construction of gate.

Carr v. *Lancashire and Yorkshire* (1852) 746
Horse killed by shunting—Gross negligence proved—Held, Company not liable, owing to special contract.

Hodyman v. *West Midland* (1864) 747
Horse injured on loading bank before being received or booked—Company held liable to the extent of £50 (value undeclared).

Dawson v. *Midland* (1872) 748
Mare strayed on to line through gap in Company's fence—She was owned by a person who only rented a stable in the field—Company held liable.

Combe v. *London and South Western* (1874) 749
Colt broke its leg while being unloaded from truck—Company held liable.

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745. *Fawcett* v. *York and North Midland Railway Company.*—Action for £55, value of two horses killed at Burton Salmon at a level crossing. The horses had strayed on the line, and the Company's gate *approaching* the level crossing had been left open. The railway was crossed by the Great North Road upon arches. Under one of these arches an occupation road passed, and which the level crossing accommodated. The gates controlling this crossing were not fixed at the two sides of the crossing; one was at that side of the arch farthest from the crossing, and the other gate (which, however, we have nothing to do with) was also some yards away from the crossing on the other side. From the gate at the arch there was a slip road, with a gate at the end, leading on to the Great North Road. The two horses had jumped and got through two or three fields and strayed into the North Road, thence through the gate and down the slip road, and thence through the open gate at the archway, and thence on to the line, where they were killed by the mail train. The case was first tried before Justice Wightman, at York Summer Assizes, 1850, when the Judge directed the Jury to find for Plaintiff, which they did, with £55 damages, reserving leave for

the Company to move to enter the verdict for them if the Court should be of opinion that there was no evidence of the road being a public highway, or that the Plaintiff's horses were not, as against the Defendants, lawfully there. On the appeal case, in the Queen's Bench, the Company contended that under the Highway Act, 5 & 6 Will. IV., cap. 50, sec. 74, the horses were committing a nuisance by straying; that by the 5 & 6 Vic., cap. 55, sec. 9, the Railway Company are obliged to keep the gates closed to prevent cattle "passing along the road from entering upon the railway;" that that obligation does not extend to stray cattle, which are not to be protected and are not lawfully on the road.

Justice Patteson said—"The 5 & 6 Vic. provides 'that such gates (crossing gates) shall be of such dimensions and so constructed as, when closed across the ends of such turnpike or other roads, to fence in the railway and prevent cattle or horses passing along the road (and over crossing) from entering upon the railway while the gates are closed.' It was entirely by the negligence of the Company in leaving the gate open that the horses have been killed; therefore, as against the Company, I am clear that the horses cannot be said to have been unlawfully on the road." Justices Coleridge and Wightman concurred. Judgment against Company.—*Tried in Court of Queen's Bench, February* 7 *and* 8, 1851.—*From Law Journal Reports, vol.* 20, *page* 222. (This Judgment has been varied in subsequent decisions.)

746. *Carr* v. *Lancashire and Yorkshire Railway Company.*—Action for £87 for a horse loaded in a horse-box, Wakefield to Knottingley, which being propelled against some trucks with violence, the horse was seriously damaged, and died in consequence. At the trial, before Baron Alderson, at York Assizes, the Jury found the loss had been occasioned by the gross negligence of the Company, and gave a verdict for £87. A rule *nisi* having been obtained to arrest the Judgment, the case was re-heard. Baron Parke, in giving Judgment, said—"The question wholly turns upon the notice at the foot of the cattle ticket. It is clear that since the passing of the Carriers' Act it is competent for a carrier to make a special contract to convey goods, and that the liability may be made to depend

upon the terms of the contract. Here a special contract was made, and the only question is the meaning of that contract. The practice of a carrier protecting himself by a mere notice was put an end to by the Carriers' Act. Whether the Company are liable by their common law liability there is no necessity to discuss upon the present state of this record. Sheep, cattle, and horses were not commonly carried by the old road carriers. These are new risks brought about by railways, and it is very reasonable that carriers should be allowed to make agreements to protect themselves against such risks to which in these modern times they are exposed. The rapid motion, the noise of the engine, and various other matters are apt to alarm horses and cause them to do injury to themselves. The only question here is whether the Company have protected themselves (by special contract) against loss arising from their gross negligence in carrying the Plaintiff's horse. I am of opinion the Plaintiff has taken upon himself all risk of conveyance, and that the Railway Company are only bound to find carriages and propelling power. The Company say they will not be responsible for any injury or damage, *however caused.* Thus the Plaintiff is to stand to all risk of accident or injury, and when we look at the nature of the thing conveyed (the horse), there is nothing unreasonable in this arrangement. If any inconvenience arise from such contracts being entered into, it must be left to the Legislature, who may, if they please, put a stop to this mode which the carriers have adopted of limiting their liability. I am of opinion the Company is not liable." Baron Alderson concurred. Baron Platt did not concur, saying—"The case of gross negligence, as it seems to me, is not pointed at by the cattle ticket," and he could not think the Plaintiff ever dreamed of such a thing when he signed the contract. Baron Martin concurred with Barons Parke and Alderson, and remarked—"If we hold the carriers in this case responsible for gross negligence, we shall place them in the situation of insurers and underwriters." Judgment for Company.—*Tried in Exchequer Court, Easter Term*, 1852.—*Exchequer Reports, vol.* 7, *page* 707.

747. *Hodgman* v. *West Midland Railway Company.*—Action for loss of a racehorse, Worcester to London. The

horse was brought on to the loading bank. A porter called out, "London horses this way," and the groom took the horse in the direction indicated. There were a quantity of sharp-edged girders or rails lying on the bank. Another horse in front became terrified, and backed upon the Plaintiff's horse. This caused Plaintiff's horse to back suddenly against the girders, and the result was Plaintiff's horse became injured by the sharp edge of one of the girders, and it became necessary to kill the animal. No ticket had been given, and no declaration of value made. The practice was not to issue the tickets until the horses had first been loaded. The case was first tried at the Westminster Sittings after Trinity Term, 1863, when Chief Justice Cockburn told the Jury to find for the Plaintiff if they thought the Company had been guilty of negligence in leaving the girders in such a position in the yard and the groom had not been guilty of negligence. The Jury found a verdict for Plaintiff for £1,000. The Company appealed, calling upon Plaintiff to show cause why the damages should not be reduced to £50, on the ground that the Plaintiff's right to recover was limited to that sum by the 17 & 18 Vic., cap. 31.

On the appeal case, in delivering Judgment, Justice Mellor said—"In the provisions of the statute 17 and 18 Vic., cap. 31, sec. 7, it is stated, 'with respect to the *receiving*, forwarding, and delivering of any such animals;' then follows the proviso as to £50 being the maximum value the Company shall be liable for in the absence of a declaration. The horse was sent to the Company's premises for the sole purpose of being *received*, *forwarded*, *and delivered*, and I think the accident occurred in the course of the delivering to and the receiving by the Company. It cannot, I think, be contended that the limitation of the liability of the Company only commences with the taking of the ticket, for, if so, the act of receiving the horse would be complete by placing it in the box before the limitation would attach. It appears to me the more reasonable construction is that so soon as the horse enters the Company's premises for the purpose of being received, forwarded, and delivered, the act of delivery begins, and that if the person sending a horse to be carried on the railway desires to be in a position to recover against the Company greater damages than the amount limited

by the statute, he must *have made* the requisite declaration of value before the horse was taken to the premises of the Company. I think the limitation extends beyond the duration of the contract to carry, viz., to all the incidents of the particular traffic—that is, to all the incidents attending the delivering and receiving for the purpose of being carried—and that, if the party delivering the horse to be carried desires to recover a value beyond £50, he must declare such value before the act of delivery begins. The Judgment of the Court, therefore, is to reduce the damages to £50." Justice Blackburn concurred. Chief Justice Cockburn, who had tried the first case, dissented, holding that the horse had not been accepted by the Company, and that the Act in question was consequently not applicable; that the Company were liable on their common law liability for negligence in allowing the obstruction. "It is brought against them, as owners of a yard across which they invite the public to pass, for negligence in not keeping the yard in a proper condition so that it could be passed with safety; it being now settled that any one inviting the public to a given place for purpose of business is bound to take reasonable care that the place in question can be entered with safety. It makes no difference that the Defendants are railway carriers. Their liability arises in their characters of owners of the yard, not of carriers, and the statutory protection afforded them as carriers, and as carriers only, can have no application. The proviso which for this purpose incorporates the provisions of the Carriers' Act, 11 Geo. IV. and 1 Will. IV., cap. 68, requires the same notice as is required by the 2nd section of the Carriers' Act, and which by the 3rd section of that Act is made the condition of the protection. No proof was given of any such notice having been put up as required, and the probability is the Company trust to the terms and conditions printed on the tickets which they deliver." Judgment for Company, reducing damages to £50.—*Tried in Court of Queen's Bench, June* 13, 1864.—*From Law Journal Reports, vol.* 33, *page* 233.

748. *Dawson* v. *Midland Railway Company.*—Action for £31 10s., value of a mare that escaped out of a field adjoining the railway and was killed. There was a stable in

the field, and Plaintiff had leave from the owner of the stable and field, who was a friend, to keep his mare in the stable, for which he paid, and to graze her in the field free of charge. One night the mare escaped from the stable (without, as the Jury found, any negligence on the part of the Plaintiff) into the field, and thence through a gap in the railway fence on to the railway. The Company contended they were only bound to keep the fence in repair against the cattle of owners and occupiers, and not as to the Plaintiff. The case was first tried before Justice Blackburn, at Warwick Summer Assizes, 1872, when the verdict for amount claimed was entered for Plaintiff. The Company appealed, and on the appeal case Chief Baron Kelly said—"The mare was lawfully in the close, out of which she escaped on to the railway through a defect in the fence, which the Company were bound to keep in repair. It was argued that only the owner or occupier of the close could maintain this action; but the mare was in the close by the license of the occupier, and it would be against common sense if we were to construe the statute to mean that under these circumstances the owner of the mare could not maintain this action." Barons Martin, Bramwell, and Pigott concurred. Judgment against Company.—*Tried in Court of Common Pleas, November* 7, 1872.—*From Law Journal Reports, vol.* 42, *page* 49.

749. *Combe* v. *London and South Western Railway Company.*—Action for the value of a blood colt, which got its leg broken at Farnham Station while being unloaded from a railway truck. Two mares and two colts, accompanied by a groom, left Wadhurst Station, on the South Eastern line, in two South Eastern trucks. The horses were booked to Guildford Junction. At Guildford the groom re-booked on from there to Farnham, a London and South Western Station, and the horses went on in the same trucks without remark. When the horses were loaded at Wadhurst, the groom noticed that when the flaps of the waggons were let down there was a space of three inches, sufficient to let a colt's foot go through. The porters filled up the opening, and the loading was safely performed. At Farnham the groom called attention to the same matter, and, a piece of board not being available, the

space was stuffed with straw, the same as had been done at Wadhurst. One mare and foal were unloaded all right. In unloading the second, the groom stood inside the box with his back to the flap, holding the mare and foal back till the porters said "All right;" he then led the mare out, but the foal, as it followed, put its leg through the opening and broke its leg, and had to be destroyed.

The case was first tried at Westminster, before Justice Brett and a Jury, when the Jury held that the truck was not reasonably fit for the conveyance of such horses, and that there was a want of reasonable care in the Company's servants in the unloading of the second truck at Farnham, and that there was no contributory negligence on the part of the groom. Verdict against the Company.

The Company appealed, when Justice Keating said—"At the time the contract was entered into, the horses were in a truck belonging to the South Eastern Railway Company, and the Company elected to take the horses on in that truck in which they were, and so incurred a liability in respect of the reasonable fitness of the truck of which they could not divest themselves without showing a special contract with the Plaintiff by which he elected to use this particular truck. That truck was defective, and it has been found by the Jury so to have been, and found on sufficient evidence, I think. The groom did nothing to take the matter out of the hands of the Company's servants; he did not control them in the delivery of the horses, nor was it their business to be controlled by him. I think that anything resulting from their imperfect attempt to cure the defect of the waggon with the straw is attributable to the Company's servants." Chief Justice Coleridge and Justice Denman concurred. Judgment against Company. —*Tried in the Court of Common Pleas, November* 17 *and* 18, 1874.—*From Law Times Reports, vol.* 31, *page* 613.

Horses—Miscellaneous Cases.

Case No.

Wise v. *Great Western* (1856) 750
Horse injured from delay at station in horse-box, consignee not applying for same—Company held not liable.

Robinson v. *London and South Western* (1865) 751
Unless the sender of a horse makes a declaration that the value is over £50, the carrier cannot, although sender may admit the real value to be over £50, charge insurance on the excess over £50.

Great Northern v. *Swaffield* (1874) 752
No person came to receive a horse on its arrival—It is sent to livery stables—The Company entitled to recover the livery stable charges, but have no lien to detain the horse for same.

Wood v. *Great Northern (of Ireland)* (1880) 734
Held (Quarter Sessions), that putting a horse to livery in the absence of it being claimed by consignee on arrival is tantamount to delivery to consignee.

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750. *Wise* v. *Great Western Railway Company.*—Action for £50 for damage to a horse, Newbury to Windsor. The horse had been lent on hire, and was being returned to the owner at Eton, and Windsor was the nearest station. Consignee received no advice from sender to inquire for the horse at Windsor until the day after despatch. Sender, Johnson, signed the following note:—

"*Great Western Railway.*—9.45 a.m. train, March 31, 1855, Newbury to Windsor—Mr. Wise, of Eton—Paid for one horse, 12s. 6d. Notice.—The directors will not be answerable for damage done to any horses conveyed by this railway. I agree to abide by the above notice.—W. T. Johnson."

The horse reached Windsor the same afternoon, and was shunted into a siding and forgotten. Next day consignee went for the horse, and found it was much injured by being kept in one position all night and exposed to the cold. It was contended the injury was occasioned by the negligence of the Company. A witness proved the Company were in the habit of sending horses to a stable near the station when there was no one to meet them. The case was first tried at the London Sittings after Michaelmas Term, before the Lord Chief Baron. The Baron directed a verdict for the Company, with leave to appeal. On the appeal case Chief Baron Pollock said—"There

can be no doubt whatever but that the person who had hired the horse was himself the real cause of all the mischief. The Company to a certain extent may have been blamable, but the sender had sent the horse without any letter intimating he was coming, and without any groom to attend him on the journey. It appears to us an attempt to throw on the Railway Company that which was really occasioned by the person who sent the horse. But we think the mischief was within the notice, and that the horse being accepted under a special contract, the Company was not liable for any damage that might be done to him while remaining in the station till somebody came for him. This must be considered as part of the risk of sending him from one place to another." Judgment for Company.—*Tried in Court of Exchequer, April* 30, 1856.—*From Law Journal Reports, vol.* 25, *page* 258.

751. *Robinson* v. *London and South Western Railway Company.*—Action for damages resulting from the Company refusing to accept and carry a horse, Liss to London. The station-master, who worked the telegraph, saw a message from sender to consignee stating the cost of the mare as £135. The station-master consequently refused to forward the mare unless, in addition to the ordinary carriage of 17s. 6d., insurance of £4 5s. was paid. The Company sustained this course. It seemed to be the practice for the Company, in special cases, to send their own servants down from London for horses, as sender had written to the chief office for a man and horse-box to be sent down for the horse. On the station-master's refusal, sender wrote again on 4th January to the chief office, complaining and stating it was true the mare was worth £135, but that he did not intend to insure her unless in the box she should be found dangerous from her own vice. The mare was tendered to the Company in ordinary course, and refused unless she was insured. She was then sent by the road, and an action brought at the London Sittings after Michaelmas, 1864, before Chief Justice Erle, when a verdict was given for Plaintiff. The Company appealed, and on the appeal case contended that by the Railway and Canal Act their responsibility for a horse was limited to £50, but when *declared* of greater value the Company were authorised to charge a percentage over the value above

£50; that their notices made this known to the public; and that 5 per cent. was the additional percentage they gave notice would be charged.

Chief Justice Erle gave Judgment—"I am of opinion our Judgment must be against the Company. The Company did refuse to carry the mare, because, as they say, the sender refused to declare the value to be greater than £50. I am of opinion the knowledge of the Company as to the value of the mare, not derived from a declaration by the sender, gives no title to the Company to demand a higher insurance. It is clear that the knowledge gained by the station-master through the telegraph gave the Company no right to demand the insurance on a value above £50. The strength of the Company's case (if any) lies in sender's letter of 4th January, where he says he intends to send the horse without insurance, but that, if the mare is vicious, he is willing to insure it, and states the value as £135. I think the effect of that letter is—'I do not intend to insure; but I mention the value, not with the view of fixing you with the liability, but that if, on account of the mare being vicious, it be insured, the value for that purpose is £135.' I cannot find in that letter a declaration within the statute. If the Company had said—'We do not understand what has passed; if you intend to send the horse uninsured, as not exceeding the value of £50, say so, and we will take the horse; but unless you say so we shall consider that you intend to claim the higher value, and must require you, therefore, to pay the insurance on such value.' On the whole, I am of opinion that there was no such declaration as would come within the meaning of the statute." Justices Byles, Smith, and Keating concurred. Judgment against Company.—*Tried in Court of Common Pleas, May* 1, 1865.—*From Law Journal Reports, vol.* 34, *page* 234.

752. *Great Northern Railway Company* v. *Swaffield.*—Action for £17 by Company against owner of a horse for livery stable charges—King's Cross to Sandy. Sender and consignee were the same. The horse was sent on July 5, 1872, by 8.40 p.m. train, and reached Sandy 10.8 p.m. On arrival there was no one at the station to take delivery. Consignee's residence was between fifteen and sixteen miles from Sandy, and

unknown to the station officials. Finding no one to take the horse, and it being late at night, the station-master sent the horse to Bennett's livery stables, close to the station. Soon afterwards consignee's servant applied for the horse, and was referred to Bennett, and told by the station-master that he could have the horse on paying the livery charges, which Bennett's man standing by said were 6d. The servant refused to pay the 6d. He then went over to Bennett's, and Bennett said the charge was 1s. 6d. The consignee's servant refused with insolence to pay anything, when Bennett said that now he should not have the horse for less than 2s. 6d., the full and usual charge for one night's keep, and which was admitted to be a reasonable charge. The servant went away without the horse. Next morning Defendant (Swaffield) came and demanded the horse of the station-master. He declined to pay Bennett's charge or recognise him at all, but offered to pay any demand of the Company. The station-master said the Company had been paid, but eventually said—"Rather than that you should go away without the horse, I will pay the charges out of my own pocket." Swaffield declined, and went away without the horse. On July 8 the Company wrote Swaffield the horse would be delivered to him without livery charges, but they should look to him for payment thereof. Swaffield replied that if the horse was sent to his house free of expense before a named hour, and 30s. was paid him for expenses, loss of time, and delay in delivery of horse, he would receive the horse, but under no other conditions. The Company replied the horse would remain at the stables at Swaffield's risk and expense. The horse remained at livery until November 18, 1872, when the Company sent it to Swaffield's house. The Company paid Bennett £17 for his stable charges—at the rate of 17s. 6d. per week. The Company then sued Swaffield in the County Court for the £17, and were defeated, the Judge holding that there was no contract, express or implied, upon which the Company could recover. The Company appealed.

On the appeal case Chief Baron Kelly said—"We are clearly of opinion the Judgment must be for the Company for £17. The Defendant sent a horse to Sandy by the railway, and as it was not directed to be taken to any particular place, someone on his behalf ought to have been ready to receive the horse and

take it away; but no one was there. The question then arises —What was it the duty of the Company to do? Had they any choice? They must either have allowed the animal to stand somewhere on their station until it was starved—a place of danger, where it would have been exceedingly improper to have allowed it to remain—or they must have turned it into the high road, to the danger of itself and all the Queen's subjects; or they must have put it in safe custody—in other words, put it where they did, namely, under the care of a livery stable keeper who lived close at hand. The servant comes and demands the horse. Looking at what passed that evening, it may be that an action was maintainable against the stable keeper for refusing to deliver. But next day Defendant came, and the station-master offered to pay the charges out of his own pocket in order that the Defendant might not go away without the horse. This offer the Defendant declined. What were the Company to do? They could not allow the horse to perish. Then there is the correspondence, in which the Defendant declines the repeated proposal of the Company to restore him the horse at Sandy without any charges. At last the horse is sent back. The Company placed the horse under the stable keeper's care, and were liable to pay for the keep, and did in fact pay it. I do not entertain a doubt that they are entitled to recover the money from the Defendant, for whose benefit they have incurred the expenditure."

Baron Pigott concurred, and said—"I give no opinion whether, on the evening of the 5th July, the charges, 6d., 1s. 6d., and 2s. 6d., were rightly made, or whether Defendant's servant was right in refusing to pay those charges."

Baron Pollock concurred, and said—"If the case had rested on the first occasion, when the horse having arrived a charge was made in respect of which a *lien* was insisted upon, I should have thought that the Railway Company were wrong; but the matter did not end there. I do not know of any decision of English law by which an ordinary carrier of goods by land has been held entitled to recover this sort of charge against the consignee or sender, but, in my opinion, he is." Justice Amphlett concurred. Judgment for Company.—*Tried in the Court of Exchequer, April* 22, 1874.—*From Law Journal Reports, vol.* 43, *page* 89.

MISCELLANEOUS.

Case No.

Glover v. *London and North Western* (1850) 753
The word of a single director will not bind a company, except given at a board meeting.

Hunt v. *Great Northern* (1851) 754
Company unable to require prepayment of charge for working back owner's empty coal waggons.

East Anglian v. *Lythgoe* (1851) 755
Audit clerk dismissed for publishing information relating to company—He retains £30 in hand for his three months' salary, and the retention is accepted as a legal set-off.

Travis v. *Midland* (1855) 756
Recovery of demurrage. (See also *Oxlade* v. *North Eastern*, January, 1857.)

Barrett v. *Great Northern* (1857) 757
Company held not liable to issue a through ticket on to another company's line because the two lines are continuous, no case of public inconvenience having been made out.

Williams v. *Great Western* (1858) 758
Verdict of a Jury in favour of a company cannot be set aside necessarily because a shareholder was on the Jury.

Thompson v. *North Eastern* (1860) 759
A barque stranded and wrecked in a tidal basin of a railway company—Dock company held liable.

South Wales v. *Redmond* (1861)... 760
A railway not debarred by its Act from entering into a contract for a steamer to run from its terminal station to a distant point, to and from which traffic was to be through-booked.

Bell v. *Midland* (1861) 761
Private siding off main line granted under Company's Act cannot be arbitrarily cancelled.

Attorney-General v. *Oxford Worcester and Wolverhampton* (1862) 762
A company booking passengers by another company's train held liable to pay the duty to Government.

Maunsell v. *Midland Great Western* (1863) 763
Ultra vires agreement between two companies.

The Queen v. *Eastern Counties* (1863) 764
What constitutes gross receipts liable to poor rates.

Case No.

Great Western v. *Bailie* (1864) 765
Company held liable under 5 & 6 Will. IV. to be convicted for having a false weighing machine.

Attorney-General v. *Lancashire and Yorkshire* (1864) 766
Company cannot be assessed for income tax for servants at weekly wages.

Napier v. *Glasgow and South Western* (1865) 767
A steamboat company cannot, under the Railway and Canal Act, coerce a railway company to make through rates with them.

London and South Western v. *Reeves* (1866) 768
Government forage (hay) exempt from turnpike tolls.

Savage v. *Newry Warrenpoint and Rostrevor* (1866) 769
Company unable to carry all traffic offered exercises the right of giving a preference.

Northampton Gas Light Co. v. *London and North Western* (1868) 770
Coal in owner's waggons lost in transit from an accident, axle of coal waggon breaking—Company not liable, not being common carriers of coal.

London and South Western v. *Myers* (1869) 771
Goods carried past a junction to station, and back again to junction, and consignee charged for mileage both ways—Company held to be authorised to do so.

Waterford and Central Ireland and Grand Jury (1871) ... 772
Recovery from Grand Jury of damages for malicious injury arising from a train being thrown off line.

Powell Duffryn Company v. *Taff Vale* (1872) 773
A person desiring to use his own locomotive engine on a railway cannot force the company to use their signals for such locomotive and its train.

Attorney-General v. *Great Eastern* (1879) 774
Under certain circumstances one railway company may lend to another company engines and rolling stock to work their line.

Attorney-General v. *London and North Western* (1880)... ... 775
Company liable for Government duty on the 5 per cent. they charge the public for duty, also on fees for sleeping carriage accommodation.

Birkenhead Lancashire & C. J. v. *Commissioners of Taxes* ... 776
Railway station houses liable to inhabited house duty.

Swaine v. *Great Northern* (1863) 777
Company opened a siding for manure traffic on their own ground opposite Plaintiff's house—Plaintiff sought an injunction in Chancery, but the case was dismissed.

Case No.

Great Western v. —— 778
Persons placing an obstruction on an unopen line, upon which workmen were conveyed, held to be rightly punished under 3 & 4 Vic., cap. 97.

Toomer v. *London Chatham and Dover* 779
Interchange of traffic over a spur line connecting the stations of two companies at Strood.

Bishop v. *Great Western* 780
Water dropping on to a public street from archway of a railway bridge—Held not to be a nuisance under the 18 & 19 Vic.

The Queen v. *Irish South Eastern* (1850) 781
A railway company is not bound to carry a mail guard and his bags at the same rate as an ordinary passenger.

James v. *Taff Vale and Great Western* (1881) 782
The two Defendants had two separate stations at Cardiff, and between which there was a railway connection, and they were therefore required to convey passengers from the one station to the other.

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753. *Glover* v. *London and North Western Railway Company.*—Action for the value of certain fencing, deposited by a sub-contractor (Grimson) to fence a new railway. The fencing was placed at certain places near the railway, and taken from there by the Company's labourers and used for the line. Grimson sold the timber to Glover, Plaintiff. Grimson saw Mr. Ellis, a director of the Company, and complained of the timber having been taken, who requested him to attend a meeting of the Company in London; and he attended, and was told by Ellis there was a prospect of an amicable arrangement being come to. Such not coming to pass, Glover entered an action. Baron Parke said—"What the directors of a company say at a meeting of the company will bind the company, but not what a single director says when not at a board meeting. There was no evidence in this case to fix the Company. They cannot be considered to have taken these goods by means of their servants, and cannot be made liable by using the goods converted. The Plaintiff's remedy must be against the parties who took the property. To render the Company liable it must be shown that the act was done by the authority of some person acting for the Company within the scope of his authority or

by some appointment under seal, or by the Company acting together in committee, as affording some evidence of subsequent adoption." Judgment for Company.—*Tried in Court of Exchequer of Pleas, Feb.* 7, 1850.—*Law Journal Reports, vol.* 19, *page* 172.

754. *Hunt* v. *Great Northern Railway Company.*—Action for £49 19s. 6d. for delay to certain trucks of coal in owner's waggons, which the Company refused to carry from Peterborough to Potter's Bar. The Company refused because, in addition to carriage on the coal, the Company required £2 10s. to be prepaid for bringing back the empty trucks to Peterborough. Plaintiff refused to prepay the £2 10s. The case was first tried in the Barnet County Court. Plaintiff contended that the Company's special Act (13 & 14 Vic., cap. 61, sec. 13), which enabled them to impose 4½d. per mile on every "carriage," did not include or apply to empty coal trucks; also that the Company had no right to make the charge for £2 10s. beforehand. The Company contended that by County Courts Act (9 & 10 Vic., cap. 95) there was a proviso in section 58 taking questions of "toll" out of the jurisdiction of County Courts. The Judge, however, gave Judgment to Plaintiff for £39 19s. 6d. and £13 8s. for costs of suit. The Company appealed to the Court of Queen's Bench, when Justice Coleridge said—"The question which I have now to decide is a question of jurisdiction only, and whether the title to toll really came in question at all. It seems to me that it did not, but that the only question was whether, in the particular instance, the *liability to the payment* of the toll was made out. Nothing can be more distinct than the title to a toll, and whether a thing falls under the description of the articles that are to pay toll. One is purely a question of title, the other of the construction of an Act of Parliament. The question here was whether the truck that conveyed the coals was a "carriage." Though the Judge may have had no jurisdiction to try whether the Company had a right to a toll upon carriages, it seems to me that he had a perfect right to say whether a coal truck was a carriage within the meaning of the Act. I express no opinion as to whether the County Court decided the question correctly.

If a second action should arise, I think the case would be a very proper one to be removed into a Superior Court." Judgment against Company.—*Tried in Court of Queen's Bench, April* 27, 1851.—*From Law Journal Reports, vol.* 20, *page* 349.

755. *East Anglian Railway Company* v. *Lythgoe.*—Action for £30, Company's money, due by Defendant to his employers. Defendant was audit clerk to the Company under an agreement at £140 a year, determinable by three months' notice or payment of three months' salary. In August, 1850, the directors discovered that Defendant was carrying on a private correspondence with the manager of another railway, and also an agent who acted as joint agent for Plaintiffs' and another railway, detailing such information as the directors considered should not transpire except at the periodical meetings of the Company, or an unfair advantage might be derived from priority of information. The directors challenged Defendant with the fact, and he produced copies of three letters he had written, whereupon Defendant was discharged the service without notice or three months' salary. Defendant retained £30 he had in hand towards the £35 he claimed as the quarter's salary. The case was first tried in the Lynn County Court, and Defendant pleaded a "set-off," when the Judge decided in favour of the Defendant and his "set-off," saying—"It has been held in *Callo* v. *Bronveker* (4 Car. & P., 518) that to justify such a dismissal there must be proved against him moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect. Neither of the two latter is imputed to him." The Judge did not consider the first and third letter amounted to moral misconduct; the second letter he considered charged the Company with shuffling conduct. "This was a most improper communication to proceed from an *employé* of the Company, and would morally abundantly justify the Company in dismissing the Defendant, but it will not legally justify them in dismissing him without notice or salary, because, I think, a proper test by which to try it is this—that in an action for the libel no damages would be recovered unless special damage was proved." This decision was appealed against to the Court of Common Pleas as to whether the

"set-off" was properly allowed. The Company contended that Defendant publishing information which he acquired solely in his capacity of audit clerk, and which it was his duty to keep secret, was moral misconduct justifying immediate dismissal without notice or wages. In the note to *Cutler* v. *Powell* (2 Smith's L.C., 20) it is said, as the result of the authorities, "that a clerk, servant, or agent wrongfully dismissed has his election of three remedies—(1) He may bring a special action for his master's breach of contract in dismissing him, and this remedy he may pursue immediately; (2) he may wait till the termination of the period for which he was hired, and he may then perhaps sue for his whole wages in *indebitatus assumpsit*, relying on the doctrine of constructive service; (3) he may treat the contract as rescinded, and immediately sue on a *quantum meruit* for the work he actually performed."

Justice Maule said—"I am of opinion that the case has been properly decided in the County Court. It is plain the Judgment of the County Court cannot be reviewed as a matter of fact, although it may with respect to the rejection or admission of evidence. But there was no rejection of evidence here. If the parties leave it to the County Court Judge to decide both the fact and the law (not electing to have a Jury when the case involves a sum over £5), they, in some measure, put the Judge in the situation of an arbitrator, and it is found practically convenient that such a decision should not be open to review. Assuming that the appeal will lie, I am of opinion that the Respondent is entitled to our Judgment, and that the appeal must be dismissed, with costs." Justice Williams and Justice Talfourd concurred. Judgment against Company.—*Tried in Court of Common Pleas, Feb.* 21, 1851.—*Law Journal Reports, vol.* 20, *page* 84.

756. *Travis* v. *Midland Railway Company.*—Action for 9s. 6d., three days' demurrage charged on a waggon of lime not unloaded, and 6d. loss of time by Plaintiff's carter—Derby to Sheffield. Plaintiff was duly advised of the arrival of the waggon, and that the charge would be made. Until he had been notified three times he did not unload the waggon, which he did on the fourth day. Plaintiff pleaded that, as the

waggon remained on the Company's premises, and one of their workmen could have unloaded the waggon in half-an-hour, it was not fair to charge him demurrage, as he would have paid the charge for unloading. The Company pleaded the lime was carried at station to station rates—which was cheaper than ordinary rates—and the conditions were that senders should load and consignees unload. The Judge said—"The Company, having made a special arrangement to carry at cheaper rates, had a right to attach what conditions they chose to the conveyance under this special arrangement; and individuals who availed themselves of the arrangement must abide by the conditions attached." Verdict for Company.—*Tried at the Sheffield County Court, May* 30, 1855.—*From Clearing House Reports, page* 46.

757. *Barrett* v. *Great Northern, also Midland Railway.* —Action in respect to through booking between King's Cross and Settle. Plaintiff sent to Defendants, the Great Northern and Midland Companies, notices that on a particular day and train he would demand a through ticket and through conveyance between King's Cross and Settle, and if same were not granted he would take the Companies to the Court of Common Pleas under the Railway and Canal Act, 1854. Plaintiff was aware that a through ticket, London to Settle, could be obtained between Euston Square and Settle, but he contended that that route was 19 miles longer than the route *via* Great Northern. Plaintiff carried out his notice in demanding a ticket both at King's Cross and, on the return journey, at Settle, and in both cases he was refused, and he had to book to Leeds and there re-book, and also, at Leeds, to lose time in going from one station to another across the town. He then brought his action, when Chief Justice Cockburn gave Judgment. He said—"I am of opinion that no case has been made out by Plaintiff for the interposition of the Court. To justify a party in calling upon the Court to enforce the provisions of this Act, it is not indispensably necessary to show a case of individual grievance, but it is clear that a case of public inconvenience must be made out. It does not appear, even upon Plaintiff's affidavit, that there is a want of sufficient accommodation on the part of the public, and no complaints have been made to

the Defendant Companies. I can quite understand that two competing companies may so arrange the departures and arrivals of their respective trains as to operate injuriously to the shorter line and inconveniently to the public. In such a case the Court would be justified in interposing under this Act. But it appears here that abundance of accommodation is provided on the Midland line, and although the distance travelled over is somewhat longer, no additional cost is incurred, nor any material greater loss of time sustained by the public. And one striking fact is that the Great Northern Company, the parties by far the most likely to be injuriously affected by it, so far from complaining, are satisfied with the arrangement existing, and appeal by their counsel to oppose this rule." Justices Cresswell and Williams concurred. Judgment for the Companies.—*Tried in Court of Common Pleas, January* 13, 1857.—*From Neville and Macnamara's Reports, vol.* 1, *page* 38.

758. *Williams* v. *Great Western Railway Company.*—Action for the value of a bull killed. The case was tried at Worcester, before Justice Byles, and a verdict given for the Company. A rule for a new trial was moved for on the ground that one of the Jury was a shareholder of the Company. Baron Bramwell said—"You should have challenged the Juror; not having done so, you cannot now, the defect not having been pointed out at the time when it might have been cured, claim a new trial. It would otherwise be open to every person suing a public Company to lie by, take his chance of a verdict, and then apply for a new trial on the ground that a shareholder happened to be in the box." Chief Baron Pollock said—"The Court might interfere if they perceived that injustice had been done, or if there had been any manœuvre to procure such a person to be on the Jury for the purpose of influencing the other Jurymen."—*Tried in Court of Exchequer, November* 13, 1858.—*From Law Journal Reports, vol.* 28, *page* 2, *Exchequer.*

759. *Thompson* v. *North Eastern Railway Company.*—Claim for value of the barque "New Zealand," 674 tons burthen, stranded and wrecked at the entrance to the Jarrow Docks, near South Shields. On the 3rd March the Company advertised these docks, then newly constructed, as ready for the reception

of vessels of 1,000 tons. The "New Zealand" passed in empty, and loaded a cargo of coals; but on coming out on 19th March with a pilot, got stranded in the tidal basin. Between the river Tyne and the dock the Company had constructed a tidal basin of 9 acres and 540 feet long. This tidal basin had not been completely excavated. A channel 70 feet wide had been cut, but not in a direct line between the entrance of the basin and the entrance of the dock. Each side of this channel was a bank 25 feet wide and $3\frac{1}{2}$ feet high. On one of the banks the barque stranded. The case was tried at the London Sittings after Hilary Term, 1860; and after the Jury had answered a number of questions put to them, the Judge (Chief Justice Cockburn) entered a verdict for Plaintiff, the amount to be settled out of Court. The Company appealed, when the verdict was confirmed in the Queen's Bench, before Chief Justice Cockburn and Justices Hill and Blackburn. It was held the Company were guilty of a negligent breach of duty, which was imposed upon them by common law, of taking reasonable care that their dock, when kept open for public use for their profit, should be so free from obstruction as that those using it might do so without danger to their lives or property. Judge Cockburn considered it was negligent to open a dock for vessels when it was in such a state that at high tides the water of the basin would appear to be throughout of the depth marked on the sill, and yet the navigable water-way was restricted to little more than half the apparent width. No notices were posted up marking the narrower and deeper channel by buoys or other indications. Judgment against Company.—*Tried in Court of Queen's Bench, November* 22, 1860.—*From Law Journal Reports, vol.* 30, *page* 67, *Queen's Bench.*

This decision was appealed against and taken to the Exchequer Chamber, where Chief Justice Erle, with the concurrence of the other Judges, affirmed the Judgment.—*From Law Journal Reports, vol.* 31, *page* 194.

760. *South Wales Railway Company* v. *Redmond.*—Action by the Company for loss and destruction of pigs and cattle on the sea, between Cork and Milford, which the Company had undertaken, by through contract at Cork, to carry to

England. The Defendant had entered into a contract with the Company to run a steamer ("The Troubadour") in connection with the railway train service between Cork and Milford for twelve months. There was power to determine the contract after six weeks by giving four weeks' notice. The Company contended that on the voyage in question the steamer was sent to sea in an unfit and unseaworthy condition, with an incompetent master; that the loss in consequence arose, and that the Company had to recompense the owners of the cattle; that Defendant took off and discontinued the steamer without giving the Company four weeks' notice. Defendant—That the contract was *ultra vires*, and made by the Company in violation of the purposes for which the Company was incorporated, and was consequently null and void. Chief Justice Erle said—"I am of opinion the Company is entitled to Judgment. In all cases that I am aware of where a similar contract has been held to be illegal, the object to be effected was something wholly unconnected with the purposes of the incorporation. One of the earliest cases was that of the Harwich Steam Packet Company (*Coleman* v. *Eastern Counties Railway*, 10 Beavan, 1), where it was held that, as between the shareholders and the directors of the Company, the diversion of a portion of its capital to the support of a concern foreign to the objects of its incorporation was a breach of trust. But there the Company were, in a given event, to purchase the steam vessels. So far from a contract with the Company to facilitate the forwarding of passengers and goods to Ireland being illegal, I rather gather that the Legislature contemplated and intended that a railway terminating at Milford Haven should forward traffic to and from Ireland; and therefore this contract would be entirely within the scope and object of the Company's incorporation or extension." Justices Williams and Willes concurred. Judgment for Company.—*Tried in Court of Common Pleas, May* 31, 1861.—*From Common Bench Reports, vol.* 10, *page* 675.

761. *Bell* v. *Midland Railway Company.*—Action for £5,000 for blocking up and obstructing a coal siding at Leicester belonging to Plaintiff. In 1839 Plaintiff obtained the consent of the Company to make the siding, and it had

been worked from that time up to 1857 for coal traffic. The land belonged to Plaintiff, and the Company made an access to connect their railway therewith. Trucks of coal were brought to the mouth of the siding and given an impetus by the engine and shot in. Plaintiff had built a wharf, and let off portions to tenants, charging a royalty per ton on the coal unloaded and a minimum charge. Nutt paid him £200 a year, Gould £180 a year, and the Plaintiff had an offer of £300 for the portion he occupied himself. Plaintiff contended he acquired the use under the Company's Act, 6 & 7 Will. IV., cap. 78 (local and personal), sec. 75, and 7 & 8 Vic. (local and personal), cap. 18, sec. 1, similar to section 76, Railway Clauses Consolidation Act. In June, 1857, the Company gave Plaintiff notice that in September they would cease to provide engine power for the conveyance of waggons to and from the Plaintiff's siding. The Company also set up a coal wharf of their own, and they offered Gould, one of Plaintiff's tenants, accommodation there. The Company placed carriages across the siding junction, and kept them there to block the access; and they also drove wooden baulks in the ground and put a stage thereon upon the line of rails communicating with the siding, so as effectually to block up the junction. Nutt offered to drag his waggons by horses, but he was told the Company would not allow the horses on the line. Plaintiff met the chairman of the Company and remonstrated, but was told, "That wharf shall never be a wharf again if I can help it." The case was first tried at the London Sittings before Michaelmas Term, before Chief Justice Erle, who left to the Jury—Did the Company by an intentional obstruction stop up the communication with Plaintiff's wharf, and prevent him from using the same? The Jury answered in the affirmative, and gave a verdict for £1,000.

The Company appealed. Justice Willes said—"I agree with the Chief Justice (Erle) the verdict should stand. The Plaintiff acquired, under a section similar to the 76th section of the Railway Clauses Consolidation Act, the use of a siding, which he used for the purpose of a coal wharf, part of which was let out to tenants, and part remained in his own hands for which he desired to get a tenant, to obtain a rent which would be enhanced by the use of the

ding. He had as much right to use that siding for the convenience of the wharf as the Company had to use their railway for the purpose of making profits on it. If the parties had stood on their strict rights in the first instance, his right would have been to use the railway with engines of his own, and he would have had to get the approval of his engines in the mode pointed out by the statute; but that was not the way in which the matter was arranged, and the Company supplied the steam power and brought the coals to the mouth of the wharf, gave an impetus to the trucks, and sent them down the siding. That was the course of dealing till the quarrel took place in 1857, which arose, not from the misconduct of Bell or his tenants, but from this—that the Railway Company were desirous of having a wharf of their own, and of withdrawing the traffic from Bell's wharf to it and getting it for themselves, and stopping the use of the siding. This they tried by three means—(1) By ceasing to give the impetus; (2) by stopping the practice of leaving the trucks with coal at the mouth of the wharf, and by carrying them on to their own wharf; (3) and it is on this that the whole question depends, by putting an obstruction at the mouth of the Plaintiff's siding, and directing their servants, in fact, to block it up by a line of carriages, which was to remain and which did remain during the time complained of. This the Company did with the avowed intention of preventing the Plaintiff using the siding at all. Then it is said the Company are not bound by what was said by the chairman, and for a long time I was under the impression that I had misunderstood the counsel, and that all that they meant to do was that they would not carry any longer, and that this obstruction was accidental, or done by the chairman, and not by the Company at all. But I looked at the Judgment in the case in Chancery, and at what took place before Vice-Chancellor Wood in 1858 and the Lord Justices in February, 1859, and on both those occasions it was contended by the Company that they had a right to block up the siding, and that Bell had no right to the siding at all; and, on finding that, I felt some astonishment that the Company should have instructed counsel to deny that they had any such intention.

That is an entire mistake; the Company did, in respect of that third matter, so far as they could, and by the most effectual means, stop the siding. Then you have a private right and an obstruction put there to prevent the use of that right, and with the intention of denying it; and it is said that that is not actionable by the reversioner, first, because it could not be enjoyed without an engine being employed by the Company, and secondly, they say, 'You cannot complain, because you did not bring your trucks to the place.' But *lex non cogit ad vana aut impossibilia;* it would have been useless to have procured an engine; it would have been expense thrown away by reason of the act and conduct—and intentional act and conduct—of the Defendants denying the right. It is not like a public right of way on which a man must walk first before he acquire the right. Again, it is said that the Plaintiff cannot bring the action because he was reversioner. The answer to that is, that as to part he had it in his own hands; but there is another. It is only necessary to refer to the case of *Kidgell* v. *Moore* (19 Law Journal Reports, 177, C.P.), in which the locking of a gate was held to be sufficiently permanent in its character for a reversioner to maintain an action. One does not like to descend to see whether the gate was on its hinges or not. The obstruction was sufficiently permanent, as was found by the Jury, and there was evidence for them; but I will remark that an act may be permanently injurious by affecting tenants. Thus an action on the case lies by a man, if his tenants are impoverished by distresses, to come to another Court—*Com. Dig. lit.*—action on the 'Case for a disturbance;' and 'if he threaten the tenants of another so that they depart from their tenures,' 'Malicious misfeasance.' As to the amount of damages, this was a case, though the action is not in trespass, in which the Jury might give exemplary damages, from the character of the wrong and the way in which it was done. *Emblen* v. *Myers* is an authority for that proposition." Verdict against Company for £1,000 confirmed. —*Tried in Court of Common Pleas, April* 23, 1861.—*From Law Journal Reports, vol.* 30, *page* 273.

762. *The Attorney-General* v. *Oxford Worcester and*

Wolverhampton Railway Company.—Action for £100 11s. 5d. by the Attorney-General for duty at 5 per cent. on third class passengers between January 7, 1856, and November 30, 1858, booked at some stations on the loop line, Abbotswood to Stoke Works. The piece of line passes through Worcester, and is about fourteen miles long, and the Midland Railway have running powers over it with their own trains, which they exercise. The Oxford Worcester and Wolverhampton Company act as agents for the Midland Company in booking passengers. The 5 & 6 Vic., cap. 79, sec, 4, requires a company *receiving* the fares to pay the duty to the Government. The 7 & 8 Vic., cap. 85, with regard to the remission of duty on third class traffic, is not applicable to the case of passengers conveyed by one company on the railway belonging to another, and consequently the Board of Trade, as soon as they became aware of the arrangement, withdrew their approval of the Midland Company's third class trains running over the loop line. Before passengers booked by a third class train are exempt from duty, the Board of Trade, by the Act, must approve of such train. This approval depends upon the hour of starting, a speed of not less than twelve miles an hour, stoppage at every passenger station on the line, protection in the carriages from weather. The running powers of the Midland over the loop forbid the carrying of any passengers between intermediate stations on the loop. Hence one condition of the Act was not complied with. After the Board of Trade withdrew their approval of the train, they called upon the Midland Company to pay duty on the third class passengers by this train, which ran from Birmingham to Gloucester over the loop. The Midland Railway Company paid the duty except upon those passengers booked from the loop stations (Worcester was one), and referred the Board of Trade to the Oxford Worcester and Wolverhampton Railway Company. The Oxford Worcester and Wolverhampton Railway Company refused to pay, contending that the Act 7 & 8 Vic., cap. 85, did not apply. Baron Martin held that the Midland Railway Company, by this Act and by the Oxford Worcester and Wolverhampton Company's Act, were bound to run a third class train from Birmingham to Gloucester, including the loop, and were entitled

to the exemption. Barons Bramwell, Channell, and Wilde with the Chief Baron, held that the Company *actually receiving* the fares must pay the duty, and that the train not complying with all the requirements of the Act, the Board of Trade were entitled to withhold the exemption.—*Tried in the Court of Exchequer, January* 23 *and February* 27, 1862.—*From Law Journal Reports, vol.* 31, *page* 218.

The Great Western Railway Company, having taken over the Oxford Worcester and Wolverhampton Railway, appealed to the House of Lords against this decision on the 27th February, 1866, when the Lord Chancellor and Lords Chelmsford and Kingsdown confirmed the decision of the Court below. Judgment against the Company.—*From Law Times Reports, vol.* 14, *page* 33.

763. *Maunsell and others* v. *Midland Great Western Railway Company and the Great Northern and Western Railway Company.*—An agreement entered into between two railway companies (sanctioned by the Board of Trade), which was clearly *ultra vires*, may be set aside in part at the instance of shareholders of one of the companies, but not at the instance of either of the companies of itself. Company A covenant by agreement to apply to Parliament for powers to extend their line of railway and authorise the company to raise additional capital requisite for that purpose. The covenant also extends to authorising Company B to contribute one-third of such additional capital, and raise out of its funds the necessary amount. Such agreement was held to be illegal, the shareholders not having the protection of the Wharncliffe Meeting, by which assent by the shareholders is to be obtained. The agreement was between the Northern and Western Railway and the Midland Great Western Railway, both of Ireland, and the extension was to Boyle, Castlebar, Westport, and Ballina. Vice-Chancellor Wood gave a decree as follows:—"Declare that the agreement of August 1, 1859, so far as it purports to bind the Midland Great Western Railway Company to articles 44, 45, and 47, any or either of them, and so far also as articles 48 and 49, or either of them, purports to subject the Midland Great Western Railway Company to any action, arbitration, or

other proceeding or damages for any non-observance of the aforesaid articles 44, 45, and 47, or any or either of them, is *ultra vires* and void."—*Tried in Vice-Chancellor Wood's Court, February* 27 *and June* 3, 1863.—*From Law Times, vol.* 8, *pages* 347 *and* 826.

764. *The Queen* v. *Eastern Counties Railway Company.* —Action by parishes for poor rates. The Company contended that the gross earnings per mile were reducible for poor rate levy by terminals paid out in handling the traffic. The Court held that the stations were to be treated as only indirectly contributing to the profits of the line; that the amount of terminals and the amount of the expenses incurred in earning them were parts of the general earnings and expenses of the line, and were to be treated as any other part of the gross receipts and outgoings; and therefore that the Company were wrong.—*Tried in Court of Queen's Bench, May* 23, 1863.—*From Law Journal Reports, vol.* 32, *page* 174, *M.C.*

765. *Great Western Railway Company* v. *Bailie.*— Prosecution by the Inspector of Weights and Measures against the Company for having at their Aynhoe Station a weighing machine out of order for a fortnight, weighing 4 lbs. against their customers. The machine worked with a spring, and on the dial-plate are figures engraved from zero to 560 lbs. The pointer stood at 4 lbs. when the scale was empty, consequently in weighing a 14-lbs. parcel the parcel would appear to weigh 18 lbs. A parcel of 14 lbs., Aynhoe to London, was charged 10d.; if it weighed over 14 lbs., say 15 lbs., it was charged 11d. The station-master admitted the machine was out of order, and swore he had instructed his porter to make allowance for the 4 lbs. when weighing parcels and excess luggage. He had also written Pooley & Son, the makers, who inspected the machines every three months, in addition to attending to them when reported out of order. The case was first heard before the Special Sessions at Brackley, and referred to Court of Queen's Bench. Justice Crompton held that the conviction under the 5 & 6 Will. IV., cap. 63, sec. 28, must be affirmed. "Nobody supposes the machine was kept fraudulently by the Company for the purpose of defrauding the passengers, but the Act

intended that they should not keep such a false machine as might lead to mischief if it was improperly used." Justices Mellor and Shee concurred. Judgment against Company.—*Tried in Court of Queen's Bench, Nov.* 28, 1864.—*From Law Journal Reports, vol.* 34, *page* 31, *M.C.*

766. *The Attorney-General* v. *Lancashire and Yorkshire Railway Company.*—Action by the Attorney-General for a return, and to assess the Company with income tax, under Schedule E, for their servants in receipt of weekly wages averaging £100 per annum. The Company had always given a return of their salaried officers and clerks. It was held that persons employed at weekly wages are not persons holding public employments and within the third rule of Schedule E, and a railway company is not liable to be assessed in respect of such servants under 23 Vic., cap. 14, sec. 6. Such persons, if their income amount to £100 a year, are liable to be assessed under Schedule D, directly and in the same manner as other citizens. Judgment for Company.—*Tried in Court of Exchequer, Jan.* 30, 1864.—*Law Journal Reports, vol.* 33, *page* 163.

767. *Napier* v. *Glasgow and South Western Railway Company.*—Action by a steamboat owner, under the Railway and Canal Traffic Act, for through rates between Belfast and inland Scotch stations and *vice versa*. Plaintiff's steamer, the "Lancefield," had been used by Defendants (Glasgow and South Western Railway Company) under an arrangement for through rates to and from Glasgow, *via* Ardrossan, to Belfast, and the carriage divided in certain agreed-upon proportions. The Company, for reasons of their own, ceased the arrangement, and made a similar arrangement with the owner of the steamship "Oscar." Plaintiff continued running his vessel between the ports of Ardrossan and Belfast, but was denied the same berth at the wharf as heretofore, which was now occupied by the "Oscar." Plaintiff then ran his steamer on the three days of the week when the "Oscar" did not run; still the Company withheld facilities from him. He says these facilities are very great and very important, and, indeed, necessary to success in his trade, and he says that the withholding of these from him is a contravention of the Act. The railway company, he says, won't

book goods through to Belfast by his vessel, or carry on their traffic to Belfast through the instrumentality of his vessel; that if goods are booked with them for Belfast they send them all by the "Oscar," and will send none by the "Lancefield" except such as are specially directed and addressed to be sent by the "Lancefield," and the same as to passengers. Plaintiff says the portion of carriage the Company receives when goods are booked through is much less than the sum which they charge for goods going to Ardrossan alone; consequently, when he receives the goods at Ardrossan and takes them on to Belfast, the person who receives them at Belfast by his vessel pays a much higher price than traders receiving goods by the "Oscar." The Company pleaded they had been willing to continue Plaintiff's steamer, but he would not bind himself to keep the steamer regularly on the route. The Company say the subject matter of Plaintiff's complaint does not come within the provision of the statute at all. The section of the Act upon which Plaintiff claims is—

"That every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, brakes, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company or any particular description of traffic in any respect whatsoever."

The Lord President said—"It is important to observe that the matter that we are dealing with here is not a matter applicable to the conveyance of goods merely from Glasgow to Ardrossan. It arises out of an undertaking by the Company to deliver goods at Belfast. I think it is of some importance, in construing this statute, as to whether the clause I have now read is or is not intended to apply to that class of acting; and I think that some light upon that is thrown by looking to the next part of that clause—

'Every railway company and canal company, or railway and canal company, having or working railways or canals which form part of a continuous line of railway, or railway and canal, communications, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any

unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid.'

Now this section is applicable to conveyance *beyond* the limits of a railway, and implies that the previous part is in reference to conveyance *on* the railway. But here it is separately provided what they are to do in regard to conveyance *beyond* the railway, and this provision in regard to their conduct as to traffic going beyond the railway is *limited to railways and canals*, and has nothing to do with deep-sea voyages or anything of that kind. This is not a question of an undue preference given to goods going to Ardrossan, of one person over another, or of one species of goods over another. It is a special arrangement in reference to doing something that is *ultra* of this statute altogether. And is every vessel that starts from Ardrossan to Belfast, which is ready to carry goods through, entitled to say 'You shall allow goods booked to Belfast to come by our vessel at the same rate which you are charging for your through traffic with others; you shall transact with us as you are transacting with them'? It is reasonable the Company should select the parties with whom they are to specially contract, a contract being necessary for the purpose, and I think it is not a matter within the purview of the statute at all." Verdict for Company. Lord Curriehill, Lord Deas, and Lord Ardmillan agreed in this finding.—*Tried at the First Division Court, Nov.* 25, 1865.—*From Clearing House Reports, No.* 152, *page* 174.

768. *London and South Western Railway Company* v. *Reeves.*—Action for turnpike toll on hay for the use of Her Majesty's forces at Aldershot. The Railway Company were employed by the forage contractor to convey a quantity of hay, and the Company claimed exemption from turnpike toll under the 3 Geo. IV., cap. 126, sec. 32, which exempts from toll "any waggon, &c., or other carriage employed in conveying commissariat or other public stores of or belonging to His Majesty, or for the use of His Majesty's forces." The Magistrates of Hampshire held that the Company were not exempt of toll, as the commanding officer had power to reject the hay, and hence the hay could not have become stores for the use of Her Majesty. The Company appealed to the Court of Common Pleas, when

Chief Justice Erle said—"We think the Magistrates' decision wrong; the stores were in the process of being delivered for the use of Her Majesty's troops. We think the forage contractor can hire a company to carry the stores, or anyone he likes, and that the maxim, *Qui facit per alium facit per se*, applies." Judgment for the Company.—*Tried in Court of Common Pleas, June* 21, 1866.—*From Law Times, vol.* 14, *page* 662.

769. *Savage* v. *Newry Warrenpoint and Rostrevor Railway Company.*—Action, £40 for waggons not being supplied, and Plaintiff's coal not being carried, Warrenpoint to Newry. Plaintiff usually sent his coals by canal, but the canal gates being under repair, the canal was stopped. Plaintiff pleaded the Company gave an undue preference. Company put in a notice, previously given to the harbour-master, Warrenpoint, that no waggons could be given to ships for traffic for Newry, as there were plenty of ships discharging cargo for towns further inland. Company pleaded they gave the prior accommodation to consignments for the longer distances. The Judge decided for Company—(1) There being no contract with Plaintiff, the Company had a right to make the choice in giving the preference; (2) if there had been no other cargoes to be carried, then the Company would have been liable; (3) there was no general refusal on Company's part, but a refusal under special circumstances.—*Tried before K. Johnston, Esq., Chairman, Quarter Sessions, Newry, October* 26, 1866.

770. *Northampton Gas Light Company* v. *London and North Western Railway Company.*—Action for value of two trucks of coal lost owing to the fracture of one of the axles of one of the trucks, whereby an accident occurred—Butterley Coal Company to Northampton. The Plaintiffs hired the trucks from a Mr. Whitehouse, of Northampton, and the trucks had been examined by the owner, the London and North Western Company, and the Midland Company before and during the journey. The loaded trucks of coal passed safely over the Midland Company's line, and the accident occurred on the London and North Western Company's line (Defendants'). The London and North Western Company

waived the right of objection as to their not being the contracting company. Frost was proved to have existed at the time of the accident. The Railway Company produced an axle which they swore was the one that broke; this, however, Plaintiffs disputed by a witness.

The Judge said the most reasonable opinion was that the accident arose simply from the fracture of the axle, caused, not by any fault of the Railway Company, but from some latent defect in the axle itself, which could not have been discovered at any time by the Railway Company by previous inspection. Plaintiffs had pleaded the break was produced by the train running at an excessive speed, and so causing the wheel of the truck to strike against the V-crossing and the axle to be bent. The Judge said whether frost caused the accident he considered immaterial. He did not think the snapping of an axle during frost can be considered as an "act of God" in a legal sense. "According to the decision of *Readhead* v. *Midland Railway Company* (36 L.J., Q.B., 181), the Company, as carriers of passengers, would not have been liable for consequences of such an accident arising from a latent defect. But here they are carriers of goods, and their liability seems to me to rest upon whether, under the peculiar arrangements, the Railway Company are *common carriers of coal.* They convey coal in their own trucks only upon special agreement and at their own discretion for particular parties. The Railway Company has a distinct statutory power to convey goods in vehicles provided by the consignee or sender, concurrent with and distinct from the power to carry on their own account. The fact that the Railway Company upon some occasions took charge of goods in a vehicle not provided by them, but by the sender or consignee, would of itself exempt them on those occasions from the ordinary liability of a *common carrier* for the sufficiency of the vehicle. I have come to the conclusion, from all the facts, that the Company are not 'common carriers' for coal. The Railway Company have the right to decline to be common carriers of any particular class of goods, although they are common carriers of others, as was decided in *Johnson* v. *Midland Railway* (4 Exchequer, 367). The Railway Company, in effect, say to the public—'We will not be common carriers

of coal at all, but we will be special carriers of it in particular cases if we can agree as to terms, and we will supply locomotive engines for your coal trains at a fixed charge.' The Railway Company are liable for any accidents arising to the train which are caused by the negligence of themselves or their servants in the management of it, or in the construction or superintendence of the line and the arrangement of traffic upon it, including, I consider, an accident arising from a defect in any of the vehicles provided by other parties which could have been discovered by the Company upon inspection at one of the usual points on their line before the accident happened. But the accident in this case, as I find upon the evidence, did not arise from any such negligence on the part of the Company." Verdict for Railway Company.—1868 (*date and place of trial not reported*). —*From Clearing House Reports, No.* 201, *page* 241.

771. *London and South Western Railway Company* v. *Myers.*—Action for overcharge. Plaintiff sent goods from Southampton to Luton. The Company carried them to Clapham Junction, then on to Nine Elms Station, and then back to Clapham Junction again, and over lines belonging to other companies to Luton. Plaintiff objected to pay the extra mileage charge, seeing that the Company carried the goods over an extra and unnecessary distance for their own convenience. The case was first tried before the County Court Judge of Hampshire, from whose decision Plaintiff appealed. On the appeal case Chief Justice Bovill said—"The question is whether the Company were bound to carry these goods by the nearest route, and I am of opinion they were not so bound. We must now take it that it was the usual and customary course to send goods on to the Nine Elms Station and back to Clapham Junction, and that this course was a reasonable one; and this being so, I think the Company were entitled to send the goods in this manner, and charge as they have done." Judgment for Company.—*Tried in Court of Queen's Bench, November* 15, 1869.—*From Law Times Reports, vol.* 21, *page* 460.

772. *Waterford and Central Ireland Railway Company —Grand Jury Act,* 6 *&* 7 *Will. IV., cap.* 116, *sec.* 135, *for malicious injury.*—Claim for £200, made on the Grand Jury of the County Kilkenny, for malicious injury to permanent way,

engine, carriages, and waggons. A mixed train ran off the rails at Dunmore, owing to malicious removal of fish plates from two joints of rails and displacement of rails 6½ inches. No passengers were hurt. The Grand Jury at Presentment Sessions at Castlecomer, 23rd November, 1870, threw out presentment, on allegation that notices required by Act were not properly given and served. The Company appeared again before Grand Jury at Court House, Kilkenny Spring Assizes, 10th March, 1871, and after much discussion it was submitted to Judge Lawson to decide—(1) Whether notices were properly prepared and served; (2) whether Act was applicable to malicious injuries to railway works, seeing no railways existed when Grand Jury Act was passed. The Judge heard arguments, and decided—(1) The notices were correct, and (2) the words "or other work," in section 135 of Act, took in the injury complained of; and referred presentment back to Grand Jury to find as to amount. The engineer and locomotive superintendent of Company gave evidence as to value. £150 was awarded to be levied of Barony of Fassadineen, in which the malicious injury was so committed.—*From Irish Clearing House Reports, No. 56, page* 103.

773. *The Powell Duffryn Steam Coal Company* v. *Taff Vale Railway Company.*—Action of Plaintiffs, a Colliery Company, to be allowed to use their own engines and carriages on the Taff Vale Railway Company's line, under the powers of the 92nd section of the Railway Clauses Act, 1845, 21 & 22 Vic., cap. 153. The Colliery Company desired to provide engines owned by the Rhymney Railway Company, an adjacent company, but the defendant Railway Company had not inspected or approved of such engines, as set forth in 115th section of the Act. The Railway Company contended that the Colliery Company using their own engines would have the effect of interfering with the general traffic and of making the Colliery Company the managers of their line; and they closed the gates where the colliery line of three miles joined the main line, and refused to work the signals for the colliery trains. The Colliery Company filed a bill in Chancery for an injunction requiring the Railway Company to open the gates and work the signals. Vice-Chancellor Wickens said—"I have a strong impression

that justice is on the side of Plaintiffs, and that they are merely asserting a right which the Legislature intended to give them. On technical grounds, however, I cannot make the order asked. If I were to grant the injunction it would be inoperative, for I cannot bind the Railway Company to allow the Plaintiffs to work the signals, nor can I compel them to work them for the Plaintiffs' trains. Although, perhaps, the signals may not be so necessary for working the short branch as they would be for working the main line, still the evidence goes to show that they are required. I will not give a conclusive decision against the Plaintiffs; to do so would be to decide that the 92nd section of the Railway Clauses Act is inoperative. I can only say that I entertain great doubts on the point. It seems also doubtful whether the Railway Company have waived their rights under the 115th section. On account of the technical difficulties I have referred to, I shall make no order upon it." Judgment for Railway Company.—*Tried in Vice-Chancellor Wickens' Court, March* 7 *and* 8, 1872.—*From Law Times Reports, vol.* 26, *page* 357.

774. *The Attorney-General* v. *Great Eastern Railway Company.*—Action by Ephraim Hutchings, on behalf of the Locomotive Manufacturers' Association and the Railway Carriage Builders' Association, that Defendants (the Great Eastern Railway Company) were acting *ultra vires* in lending for hire to the London Tilbury and Southend Railway Company locomotive engines, carriages, and waggons to work their traffic. The case was first tried before the Master of the Rolls in January, 1878, when Judgment was given against the Railway Company. The Company then appealed to the Court of Appeal, when Lord Justice James said—"I have arrived at the conclusion that the Railway Company are right in each of their contentions. It is manifestly, in my opinion, for the safety and convenience of the public that the same engines, the same carriages, and the same staff should be employed to do all the work, instead of one set doing part and another set doing another part. There is, as it seems to me, no pretence whatever for saying that this is a sham or a colour for enabling the Great Eastern Company to enter into some distinct business outside the

Act of Parliament which constitutes the deed of partnership between the shareholders. It appears to me that, whether as regards a private partnership, a joint stock company, or an incorporated company, in the absence of fraud or deliberate perversion, the majority of managing partners may be trusted and ought to be trusted in determining for themselves what they may do and to what extent they may go in matters directly connected with or arising out of their business relations with others. Where is this notion of *ultra vires* to extend to? Is it *ultra vires* for a railway company to make profit from the sale of meat and drink at its refreshment rooms? Would it be *ultra vires* for two companies whose lines are connected to have joint workshops for the construction or repair of their rolling stock, or joint depôts of coals and other stores, or to enter into a joint contract with such persons as the relators for the hire of the rolling stock, and to apportion the costs and expenses between themselves according to the respective train miles run on their several lines? I am far from saying that a railway company ought to be permitted to carry on the trade of ironmasters, or colliery proprietors, or rolling stock manufacturers—not casually, not incidentally, not collaterally in the *bonâ fide* conduct of their own property and business, but really as a distinct and separate trade. I am convinced such a case might be properly considered by the Attorney-General, and considered by this Court, as a fraud on the Legislature which had created and authorised the company only for what it professed and undertook to do. It is only where some public mischief is done, or where, in respect of something intended for the public protection, there is a misfeasance or nonfeasance, that the Attorney-General ought to interfere." Lord Chief Justice Bramwell concurred. Lord Chief Justice Baggallay dissented. There being two to one, the Judgment of the Master of the Rolls was reversed. Judgment in favour of Great Eastern Railway Company.—*Tried in Court of Appeal, January* 21, 24, 27, *and March* 25, 1879.—*From Law Times Reports, vol.* 40, *page* 265.

This case was carried by appeal to the House of Lords, where the decision of the Court of Appeal was confirmed.—*Tried in House of Lords, May* 25 *and* 27, 1880.—*From Law Times Reports, vol.* 42, *page* 810.

775. *The Attorney-General* v. *London and North Western Railway Company.*—Action by the Attorney-General against the London and North Western Railway Company for passenger duty. The Company charge their maximum parliamentary passenger tolls and 5 per cent. additional to cover passenger duty. The Attorney-General claimed to be paid duty on the 5 per cent. extra charge. He also claimed to be paid duty on the charge made for sleeping carriage accommodation. Judgment was against the Company in both cases.—*Tried in Court of Exchequer, March* 9, 1880.—*From Law Times Reports, vol.* 42, *page* 395.

The Company referred the case to the Court of Appeal, when the Judgment of the Court of Exchequer was confirmed. —*Law Journal Reports, vol.* 50, *page* 170.

776. *Birkenhead Lancashire and Cheshire Junction Railway Company* v. *Commissioners of Assessed Taxes.*—The Birkenhead Lancashire and Cheshire Junction Company appealed against an assessment made on them of £25 for inhabited house duty for station-master's house at Frodsham. The house was connected with the station offices and waiting-rooms. The Company claimed to be exempt; the surveyor contended the contrary. The Commissioners confirmed the charge, and the Company referred it to her Majesty's Judges. Baron Pigott and Justice Shee said—"We are of opinion that the determination of the Commissioners is right."—*Heard at a meeting of the Commission at Oakmere, August* 28, 1862.—*From Law Times, vol.* 10, *page* 918.

777. *Swaine* v. *Great Northern Railway Company.*—Action for the removal of a nuisance and for compensation since its continuance. Plaintiff had a house within some 80 feet of the Company's railway at Stevenage Station. In 1858 the Company made a siding upon land belonging to them which abutted on to a road leading to and immediately in front of the Plaintiff's house and premises. The siding was used for manure traffic. By 1862 the traffic had become very extensive. The manure was very offensive on some occasions; dead dogs and cats, fish, and other putrescent matter formed part of it. Plaintiff had often complained to the Company's officials. The

case was first tried in Chancery, before Vice-Chancellor Wood, who dismissed the case, expressing the opinion that Plaintiff ought to have complained earlier and asserted his right. An appeal was taken by Plaintiff before the Lords Justices in Chancery, when the case was again dismissed and no injunction issued, Plaintiff being referred to bring his action in another Court if so advised.—*Tried in Vice-Chancellor Wood's Court, November* 17 *and* 18, 1863.—*Law Times Reports, vol.* 9, *pages* 571 *and* 745.

778. Prosecution against several boys for placing a railway truck as an obstruction across the Great Western and Brentford Railway before it was actually opened for traffic, but at a time when workmen and materials were conveyed upon the constructed portion of the line. The case was tried before the Justices of Middlesex, and the prisoners were convicted; but an appeal was taken as a "Crown Case Reserved," on the ground that the 3 & 4 Vic., cap. 97, did not apply to an unopen line. Chief Justice Cockburn held that the statute did apply, and confirmed the conviction.—*Law Times, vol.* 2, *page* 392.

779. In the case of *Toomer* v. *Chatham and Dover and South Eastern Railway Companies* the Railway Commissioners, on 6th January, 1877, issued an order requiring the two Companies in question, under penalties of £60 and £30 respectively, to arrange and run trains on a spur branch line of 17 chains between the two Strood stations of the two Companies. The Companies appealed to the Exchequer Division, when Barons Cleasby and Hawkins held that the Commissioners had no jurisdiction, under the powers given them by the Railway Regulation Act, 1873, and the Railway and Canal Act, to make the order; for by the order they were requiring the two Companies to act jointly in doing that which neither of them, according to their powers, could do separately.—*From Law Times Reports, vol.* 37, *page* 161.

780. *Bishop* v. *Great Western Railway Company.*—Action taken before the Magistrates against the Company (Great Western) for a nuisance in having a railway bridge over a public street in such a condition that water percolated through the arch

of the bridge and fell upon persons passing underneath. It was held that, although there might be a nuisance in respect of which the Company were liable to be indicted, they were not liable to be proceeded against under 18 & 19 Vic., cap. 121, sec. 8, inasmuch as the word "nuisances" must be read in the sense of nuisances injurious to health, and the percolation of water as above mentioned could only be said to be indirectly a nuisance injurious to health. Judgment for Company.—*From Law Journal Reports, vol.* 41, *page* 252.

781. *The Queen* v. *The Irish South Eastern Railway Company.*—Action in respect to the carriage of a mail guard. In this case it was decided that a railway company is not bound to carry a mail guard with bags at the same rate as an ordinary passenger; and before the Postmaster-General can compel a company to carry such mail guards a privity must exist between them by the execution of a special contract.—*Tried in the Court of Queen's Bench, June* 3 *and* 4 *and November* 2, 1850.—*Irish Common Law Reports, vol.* 1, *page* 29.

782. *James* v. *Taff Vale and Great Western Railway Companies.*—Action in respect to two lines of railway not being continuous in booking passengers. Two railway companies, Defendants, ran trains to Cardiff. The stations were 55 chains apart from each other, but were connected by a line of railway belonging to one of such companies. Upon complaint by the inhabitants of the district that no passengers were conveyed on the railway between the two stations, although there was a continuous line of railway, the Commissioners made an order enjoining both the companies to afford a continuous communication for passengers by means of their continuous lines, and to afford due and reasonable facilities for forwarding the passenger traffic arising by one of the lines at Cardiff by the other.—*Tried in the Court of Railway Commission, May* 3 *and* 13, 1881.—*Solicitors' Journal, vol.* 25, *page* 683.

Carriage of Military Baggage.

Case No.

Attorney-General v. *Great Southern and Western* (1863) ... 783

It was decided in this case that *part* of a regiment travelling by rail could lawfully take with them the entire baggage of the whole regiment at the rate of 2d. per ton per mile.

Robertson v. *Great Southern and Western* (1877) 784

It was decided in the Court of Exchequer, Ireland, that a carrier and contractor could not have military baggage conveyed on the railway at 2d. per ton per mile.

Robertson v. *Great Southern and Western* (1878) 785

The above decision of the Court of Exchequer was overruled by the Court of Appeal.

Counsel's opinion as to the liability of Railway Companies to carry military stores by passenger trains.

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783. *The Attorney-General* v. *Great Southern and Western Railway Company.*—Action in respect to the carrying of military baggage. The Attorney-General brought this action to recover £12 13s. 10d. alleged overcharge. It appeared that when the 11th Regiment (Foot) were transferred from Kildare to Cork, part of the regiment marched to Cork by the high road, while the whole of the baggage of the battalion, some 52 tons, was sent by railway, accompanied by an officer and 75 soldiers, with women and children. There was also a second similar case of the 8th Brigade of the Artillery. The Company contended that they were only required by the Act of Parliament to convey at the 2d. per ton per mile regulation rate the actual baggage of the particular soldiers who were at the same time carried by the same train.

Held—That public baggage, stores, arms, &c., sent by railway in charge of any of Her Majesty's forces specified in the 7 & 8 Vic., cap. 85, sec. 12, is "their baggage," no matter what may be the disproportion between the amount of baggage and the number of the force in charge, and must be carried by the railway company at the rates imposed by that section. Judgment against the Company.—*Tried in the Court of Exchequer*, 1863.—*From Irish Common Law Reports, vol.* 14, *page* 47.

784. *Robertson (trading as Fishbourne & Co.), Railway Carrier*, v. *Great Southern and Western Railway Company.*—Action for difference in the carriage of a quantity of military baggage between ordinary rates and the rate of 2d. per ton per mile. A carrier, having a contract for his own benefit with the military authorities for the carriage of military stores and baggage, produced to a Railway Company the military route or order for the conveyance of military stores and baggage accompanied by a military escort, and required the Company to carry them at the low rates prescribed by the 5 & 6 Vic., cap. 55, sec. 20, and the 7 & 8 Vic., cap. 85, sec. 12; but the Company insisted upon charging the ordinary rate, which was paid by the carrier. Held—That he could not recover back to his own use the excess as money had and received.

The Company pleaded that the 5 & 6 Vic. only binds them to carry at 2d. per ton per mile when the Secretary of War comes to the Railway Company and presents to them troops whom it is necessary to move with their baggage; that no such communication took place; that no necessity of moving the troops was shown; and that the obligation to carry only arises if the necessity for moving troops with their baggage first arise. *Upon the record it plainly appears* that the custody and control of the goods was with Fishbourne & Co., and there was nothing to show that the military guard going with the baggage had any custody or control over it. The allegation that the guard accompanied it does not make it their baggage. The goods were not in the custody of the troops of Her Majesty, but were entrusted to a public carrier to carry for his own profit, and ceased to be public baggage. The statute contemplated one dealing—one person to be answerable—one person whom the Railway Company could look to for payment. The Railway Company's obligation is not to carry the baggage *of* the authorities, but *for* the authorities.

Messrs. Fishbourne pleaded the Act was not passed for the benefit of the Secretary of War alone, but for the benefit of the public, that the public revenue might get the benefit of the low rate. The military authorities are entitled to get the benefit of this contract through a contractor, and the intervention of a contractor does not practically prevent the beneficial

operation of the statute. All the Railway Company have to look to is whether it (the baggage) is the particular kind of commodity or not which they are required to carry according to statute.

Chief Baron Palles gave Judgment. After reciting the obligations of the Acts, he held that the route or order which had been produced was proper evidence of the necessity of the movement of the troops. "The question was whether, as the facts stated in the plea, an action for money had and received could be obtained by Fishbourne & Co. against the Railway Company. *That is the only question we mean to consider.* Is the obligation of the Railway Company which has been thus violated an obligation due to Fishbourne & Co.? If it is, the plea is good. If, on the other hand, it is not, Fishbourne, a stranger to the obligation, cannot sue for its breach, and the plea is necessarily bad. Is, then, the obligation one due to Fishbourne & Co., or, in other words, was the statute passed for his benefit? To treat the provisions of the Act for the carriage of Her Majesty's troops as made for the benefit of every member of the community would be to hold that any member of the community might have officers and soldiers of Her Majesty's, with their public baggage, to move, on the necessity arising for their being moved—a conclusion manifestly absurd. A statute made for the benefit of every individual entering into a special arrangement with the Government as such, is not a statute made for the benefit of every member of the community as such, and there is nothing in the statute to show any benefit intended for members of the community entering into such special arrangements. It appears to us contrary to the general policy of the law that such special benefits should be intended, because this would put it in the power of what the plea calls "the proper authorities" to job the benefit intended for the State to carriers for hire, to whom the public would have more to pay than the statute intended the public—that is, the State—should have to pay. Upon the grounds stated, we do not think the production of the route or order created any obligation to the Company. For these reasons we are of opinion that the plea is bad, and that the demurrer to the rejoinder must be

allowed." Judgment for Great Southern and Western Railway Company.—*Tried in the Court of Exchequer, Dublin, on January* 31, 1877, *before Chief Baron Palles and Barons Fitzgerald and Deasy.—From Irish Law Reports, May*, 1877.

785. *Great Southern and Western Railway Company* v. *Robertson.*—This was an appeal of the Defendant from a decision allowing a demurrer of the Plaintiffs to defences. The Defendant, who represents the firm of Fishbourne & Co., had contracted with the authorities for the conveyance of military baggage, stores, &c., and had used the Plaintiffs' railway for that purpose. He claimed under certain Acts of Parliament that the goods should be carried at the rate of 2d. per ton per mile, but was charged more. The action was brought to recover the difference which he had paid under protest. His defences, which the Court below disallowed, in substance alleged the duty of the Plaintiffs to have carried the goods at the rates prescribed by Acts of Parliament.

The Lord Chancellor, in giving Judgment, said the Appellant was a carrier who, in pursuance of a contract with the military authorities, conveyed by the Great Southern and Western Railway of Ireland public baggage, stores, and ammunition, and, having been by them charged in excess of the rate prescribed by the Act 7 & 8 Vic., cap. 85, for the carriage of such goods, sought to recover back the excess. The Court of Exchequer had determined that he could not succeed. The statutable provisions relating to the matter were the 5 & 6 Vic., cap. 55, and the 7 & 8 Vic., cap. 85. Both obliged soldiers, with their baggage, stores, and ammunition and other necessaries, to be carried by the railways; but the first left the payment for that carriage to be settled between the Secretary of War and the Company, and the second substituted for that a fixed rate of 2d. per ton per mile. The case of *The Attorney-General* v. *The Great Southern and Western Railway of Ireland*, reported in 14 Irish Common Law Reports, decided that in order to take advantage of the provisions of the 12th section of the second Act it was not necessary that the public baggage, stores, &c., should be accompanied by the whole regiment or battalion to whom they appertained as passengers on the railway at the same time

with the goods. The words of the section were held to be satisfied by any officers or soldiers accompanying the public baggage or stores. He was by no means satisfied that the true construction of the section was not that the provision as to the rate of charges was not quite independent of the circumstance as to whether or not the baggage was accompanied by soldiers. But as the view taken in the case he had cited was that which had been adopted in the pleadings and arguments of the case before them, he would in his Judgment also adopt it. The carrier averred in his pleading all the various matters which, if the baggage had been accompanied only by military persons, could be suggested as conditions to their right to have the goods carried at the statutable rate; and he then complained that, notwithstanding that, the Railway Company exacted charges exceeding 2d. per ton per mile. It seemed to be uncontroverted that if there had been no contract between the military authorities and the carrier, and if the baggage had been solely in charge of officers and soldiers, the rate of charge would have been 2d. per ton per mile. Did the fact of the interposition of the contract with the carrier alter the rate of charge, and if not, could the carrier sue to recover the overcharge? The Court of Exchequer seemed to have answered the first question in the affirmative and the second in the negative. The Court of Appeal had arrived at conclusions differing from theirs; but it should be observed that cases had been cited before them, and principles deduced from those cases, that had not been submitted to the Court below. It appeared to him that the baggage, stores, &c., did not cease to be public because the conveyance of it was arranged for by a carrier, and that the accompaniment of officers and soldiers was not the less so because a carrier was added. He was of opinion that Mr. Robertson, having been obliged to pay more than 2d. per ton per mile, was entitled to recover back the excess. The decision of the Court below should therefore be overruled. As the present was one of the cases that arose before the Judicature Act, there should be no costs of the argument in that Court; but Mr. Robertson should be allowed the costs of the hearing in the Court below.

The Lord Chief Justice, in expressing his concurrence in the Judgment of the Lord Chancellor, briefly referred to the

statutes, and declared that they imposed on railway companies an obligation with respect to the carriage of baggage of the description in question for the benefit of the public. There was no reason why that obligation should in the present case be held to be discharged, because the military authorities thought proper to enter into a contract with the Defendant, that the troops and their baggage should still be carried by the railway company at the reduced rates; and it was to be assumed that the contractor had agreed with the authorities, having regard to the fact that for a considerable part of the route the railway would be the proper means of transit. It appeared to him, therefore, that the Company were not justified in declining to carry the baggage at the Parliamentary rates, and that the contractor was entitled to recover the overcharge.

Chief Justice Morris—"I have nothing to add to the Judgments pronounced except my concurrence."—*Tried in Court of Appeal, November* 11, 1878.—*Reported in Law Reports (Ireland), vol.* 2, *page* 548.

Re MILITARY STORES.

Query on behalf of the Irish Railway Clearing House.

"It is submitted that railway companies are only bound to carry all baggage, stores, &c., which accompany a regiment going by ordinary passenger trains at 2d. per ton per mile, but that they cannot be compelled to carry by passenger trains military stores sent by a contractor for delivery at barracks and other places required by the authorities.

"To attach goods waggons to passenger trains is at all times dangerous, and if the War Authorities can insist on stores, to any extent they please, being carried by these trains, accidents and delays are likely to occur, no matter what precautions are taken.

"Counsel will please advise—

"Whether railway companies are bound to carry military stores by passenger trains, and if so, what charge they are entitled to make for such conveyance."

Opinion of Mr. W. D. Andrews, Q.C., now Mr. Justice Andrews.

"The 12th section of the 7 & 8 Vic., cap. 85, leaves this question open to doubt. I am not aware of any decision

upon it, and I am unable to express a confident opinion as to what view the Court would take if the question arose for judicial determination. My own opinion, however, is that the above section must receive a reasonable construction. It does not, nor do the corresponding sections in the other Acts (viz., 5 & 6 Vic., cap. 55, sec. 20, and 16 & 17 Vic., cap. 69, sec. 18) in express terms refer to any particular kind of train. The conveyance which is required to be provided by the railway company is to be provided 'at the usual hours of starting,' and no further indication is given by the Acts as to whether the obligation is or is not indiscriminately imposed on the company with reference to *every* train. It would appear to be both unreasonable and inexpedient for the public that a railway company should be required to carry an undefined consignment of military stores—transmitted say from a store depôt to a barrack—without being accompanied by troops, and constituting a single consignment of goods, by a limited mail train running at express speed; and the same observation seems to apply to the cases of both express and ordinary passenger trains, the difference being only in the degree of unreasonableness and inexpediency.

"The obligation imposed by the said 12th section of the 7 & 8 Vic., cap. 85, can, in my opinion, be legitimately construed to mean an obligation to convey the particular kinds of traffic by trains which are started for the conveyance of such traffic at the usual hours of starting such trains respectively. Thus troops, with or without their baggage, should be carried by passenger trains, and stores, unaccompanied by troops and constituting goods simply, should be conveyed by goods trains. This would not violate the language of the section, and would be a reasonable and safe construction of it, and in my opinion it is the construction it ought to receive.

"The 18th section of the 16 & 17 Vic., cap. 69, may seem at first sight not to favour this view, but I do not think, on careful examination, that it is opposed to it. The same reasonable construction is equally applicable to this section, and it must be read in connection with the 12th section of the 7 & 8 Vic., cap. 85, which regulates the charges.

"William D. Andrews,
"51, Lower Leeson Street, Dublin.

"19th January, 1881."

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